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No. 92-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
Attorney for Petitioner,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1029, 1056 or 1010

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
A. ORLI SPANIER,
of Counsel.

December 2, 1992
*Counsel of Record.

QUESTIONS PRESENTED

1. Should the United States Supreme Court grant certiorari in this case, where the Second Circuit, in direct conflict with the Fifth Circuit's heightened pleading requirement for Monell civil rights claims, presently under review in this Court in Leatherman v. Tarrant Co. Narcotics Intelligence Unit, ___ U.S. ___, 60 USLW 3746 (June 22, 1992), held that plaintiff's complaint, although lacking specific allegations of inadequate training and supervision, should survive a motion to dismiss?

2. Can a complaint brought pursuant to 42 U.S.C. § 1983, alleging failure to train and supervise employees, survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure where the municipality has no control over the training and supervision policies and practices of the policymaker?

PARTIES

Petitioner, the defendant-appellee below, is the City of New York.

Respondent, the plaintiff-appellant below, is James Walker.

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THE CITY OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the City of New York, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 4, 1992, which reversed the decision and order of the United States District Court for the Southern District of New York (Martin, J.), dismissing plaintiff's suit brought pursuant to 42 U.S.C § 1983 for failure to state a claim upon which relief can be granted, and which remanded the case for further proceedings.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Second Circuit, entered September 4, 1992, and from which review is sought are reported at 974 F.2d 293 (2d Cir. 1992) and are reprinted in the Appendix beginning at page 1.

The Judgment and Memorandum Order and Opinion of the United States District Court for the Southern District of New York, entered January 15, 1992, from which respondent appealed, are not reported in the Federal Supplement reporters, but can be found at 1992 WL 8160 (S.D.N.Y.), and are reprinted in the Appendix beginning at page 25.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered Judgment, from which review is sought, on September 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The case also involves Rules 12 (b)(6) and 8(a) of the Federal Rules of Civil Procedure. The case further involves N.Y. Constit., art. XIII, § 13(a)(c); N.Y. Co. Law §§ 700, 926 (2), 930 (McKinney's 1972); and N.Y. Public Officers Law, § 2 (Mckinney's 1988). The statutes and rules are reprinted in the Appendix to this Petition beginning at page 36.

STATEMENT OF THE CASE

The plaintiff, John Walker, brought suit solely against the City of New York, pursuant to 42 U.S.C. § 1983 and New York State common law, alleging violations of his constitutional rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, during a criminal case in which he was prosecuted for and convicted of murder (A5-19).[1]

Plaintiff's Monell[2] claim against the City of New York alleged that the New York City Police Department ("NYPD") and the King's County District Attorney's Office ("DA's Office") had "grossly or recklessly or deliberately inadequate policies, procedures and regulations" regarding the safeguarding of citizens' constitutional rights in the areas of disclosing exculpatory evidence, offering and eliciting truthful testimony during criminal proceedings, and avoiding unjust convictions, and that the NYPD and DA's Office grossly, recklessly or deliberately failed to train and supervise their personnel in these particular areas (A16-17). Plaintiff further alleged that during the prosecution of his criminal case, exculpatory evidence was improperly withheld from him, and that a police officer, an assistant district attorney and a material witness committed perjury. Plaintiff claimed that as a result of the misconduct and the inadequate

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[1] Numerical references in parentheses preceded by the letter "A" refer to pages in the joint appendix filed in the Second Circuit Court of Appeals.

[2] Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

policies, procedures, training and supervision, his constitutional rights were violated, he was wrongfully convicted and he was improperly incarcerated for nineteen years (A16-17).

Defendant moved to dismiss the complaint on the ground that plaintiff had failed to state a claim upon which relief could be granted (A27-28). In lieu of responding to defendant's motion, plaintiff filed an amended complaint (A 29-56).

In addition to the Monell claims that he had already made, plaintiff now alleged that the NYPD lacked any written policies, procedures, or practice guides, and gave no training, or insufficient training, in how to handle exculpatory evidence, how to deal with improper conduct on the part of personnel in the DA's Office, and the duty to testify truthfully in criminal proceedings (A 43-45). Moreover, plaintiff alleged that the DA's Office lacked an adequate training program for new assistant district attorneys concerning their obligations to disclose exculpatory evidence and to avoid the introduction of perjured testimony in criminal proceedings; the office lacked any written policies, procedures or practice guides concerning these matters; and it failed to supervise and evaluate assistant district attorneys with respect to these matters, despite the high volume of cases that each attorney was required to handle (A45-47).

Plaintiff further alleged that both the Commissioner of the NYPD and the District Attorney had the authority to promulgate and implement policies and procedures in their respective offices, either themselves or through authorized delegates, and that the enumerated deficiencies were a

substantial factor in causing the violations of plaintiff's constitutional rights (A47-49).

Defendant moved to dismiss the amended complaint for the same reason and pursuant to the identical authority as set forth in its first motion (A60-61).

The District Court Opinion

In a memorandum endorsement entered on January 14, 1992, the United States District Court for the Southern District of New York (Martin, U.S.D.J.) dismissed plaintiff's federal claims with prejudice (25-33).[3]

While the Court recognized the general rule that at the pleading stage of a § 1983 action a plaintiff need only make a "'short and plain statement of the essential elements of his claim . . . [but] is not required to set out the facts in detail'", it went on to state that "what is an adequate 'short and plain statement' depends on the case at hand, and the type of claim" (27-28) (citations omitted). The Court found that in order to survive a motion to dismiss, a § 1983 Monell claim alleging failure to train and supervise must contain "'specific allegations indicating a deprivation of rights'" that go beyond conclusory allegations (27-28, including n.1,) (citations omitted).

Citing City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), the Court went on to state that a claim of lack of

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[3] Numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

training only rises to the level of municipal liability under § 1983 if it constitutes "deliberate indifference" to people's constitutional rights as evidenced by either an "obvious"need for training, or a pattern of constitutional violations that would put the municipality on notice that training was necessary (27).

Applying this standard to the claims against the DA's Office, the Court found that plaintiff had not alleged a pattern of constitutional violations involving either the use of perjured testimony or the mishandling of exculpatory evidence that would put the district attorney on notice that training was necessary, and that because of their legal education and preparation for the bar, it was not obvious that assistant district attorneys needed on-the-job training in these areas (27-28). The Court found plaintiff's allegations against the DA's Office insufficient under the pleading requirements for a § 1983 claim; therefore it dismissed them (28-29).

Applying this standard to plaintiff's claims against the NYPD, the Court found that because it was undisputed that the police officer had turned over all exculpatory evidence to the DA's Office, his obligations under Brady v. Maryland, 373 U.S. 83 (1963) had been fulfilled; therefore plaintiff failed to make out a policy and practice claim of failure to train or supervise police officers in their duty to disclose exculpatory evidence (30-31). The Court further found that plaintiff had not alleged a pattern of constitutional violations resulting from the NYPD's failure to train officers not to perjure themselves and not to attempt to convict innocent people, and it found that the need for training in these areas was not so obvious that the NYPD should have known that training was necessary (31-33). Accordingly, the

Court held that plaintiff's allegations against the NYPD were insufficient to withstand defendant's motion to dismiss (33).

The Opinion of the Second Circuit

On September 4, 1992, the United States Court of Appeals for the Second Circuit (Walker, C.J.), reversed the order and judgment of the District Court and remanded the matter for further proceedings (1-2).

The Court set forth three requirements for making out a claim against a municipality for failure to train or supervise its employees sufficient to constitute deliberate indifference to people's constitutional rights under a Canton analysis (10-12). The Court stated that a plaintiff must show that "a policymaker knows 'to a moral certainty' that her employees will confront a given situation; the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult, or that there is a history of employees mishandling the situation; [and] the wrong choice by the City employee will frequently cause the deprivation of a citizen's constitutional rights" (11-12) (citations omitted). The Court went on to state that a motion to dismiss the complaint should only be granted if, accepting plaintiff's factual allegations as true, and drawing all reasonable inferences in his favor, "'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (12) (citations omitted).

Applying this standard and test to plaintiff's allegation against the NYPD concerning exculpatory evidence, the Court affirmed the District Court's dismissal of the claim, because plaintiff alleged that the police had

disclosed all such evidence to the prosecutor and therefore had fulfilled its Brady obligations (13-16).

With respect to plaintiff's claim of perjury, the Court found that, although the NYPD knew to a moral certainty that officers would be confronted with opportunities to commit perjury, and that failure to resist such opportunities would almost certainly result in deprivations of constitutional rights, plaintiff's pleading of this claim was defective because it failed to allege either that it was likely that appropriate training would make the choice less difficult, or that there had been a pattern of perjury that should have put the NYPD on notice of the need for training in this area (16-17). Despite reaching this conclusion, the Court held that plaintiff should be permitted to pursue discovery in order to determine whether there was a practice of condoning perjury, or a pattern of police perjuring themselves sufficient to put the NYPD on notice that training and supervision was necessary in this area (17-18).

The Court went on to state that the same analysis and holding applied to plaintiff's claims against the DA's Office concerning perjury (18). Then, applying the same standard and test to plaintiff's claim concerning the disclosure of exculpatory evidence, the Court found that plaintiff had sufficiently stated a claim, because the district attorney knew to a moral certainty that his assistants would acquire Brady material; the failure to disclose such material would almost always lead to a substantial violation of constitutional rights; and, in 1971, only seven years after Brady had been decided, the standard enunciated therein was not so obvious or easy to apply so as not to require training and supervision (18-19).

Finally, the Second Circuit held that the district attorney is a municipal policymaker, for purposes of § 1983 liability in claims of failure to train or supervise (21). The Second Circuit based its decision on the distinction that it had created between activities involving the prosecutorial function, i.e., bringing indictments and conducting hearings and trials for which no Monell liability will lie, because under such circumstances the prosecutor is acting on behalf of the State, and activities involving administrative functions, i.e., disciplining, training and supervising office personnel, for which Monell liability will lie because, under such circumstances, the district attorney is classified as a county officer under New York State law (20-21). The Court found that because the City of New York had conceded that the district attorney has final discretionary authority to implement training and supervision policies in his county, and because, in New York City, the counties are subdivisions of the City, the Court found that defendant could be held liable in a § 1983 failure to train and supervise claim, notwithstanding the fact that no City official has any veto authority over the decisions of a district attorney (21).

The present Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT AMONG THE CIRCUITS AS TO THE DEGREE OF FACTUAL SPECIFICITY REQUIRED, IN PLEADING MONELL CLAIMS PURSUANT TO 42 U.S.C. § 1983, IN ORDER TO SURVIVE A MOTION TO DISMISS. BECAUSE OF THE INCREASING NUMBER OF SUCH CLAIMS BEING FILED NATIONWIDE, THIS IS AN IMPORTANT QUESTION FOR THE SUPREME COURT TO DECIDE.

The Supreme Court recently granted certiorari in Leatherman v. Tarrant Co. Narcotics Intelligence Unit, 954 F.2d 1054 (5th Cir. 1992), cert. granted, 60 USLW 3746, (June 22, 1992) on the very issue of whether a civil rights complaint against a local governmental entity, alleging constitutional violations caused by the entity's alleged failure to train and supervise its police officers, should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure when it fails to satisfy the Fifth Circuit's heightened pleading requirement, or whether the heightened pleading requirement is prohibited either by Rule 8 of the Federal Rules of Civil Procedure, or by the Rules Enabling Act contained in 28 U.S.C. § 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right. As set forth below, the Second Circuit's liberal pleading requirement for Monell § 1983 claims alleging failure to train or supervise is inconsistent with the heightened pleading requirement applied by the Fifth Circuit in Leatherman, and presently under review in this Court. If this Court adopts the Fifth Circuit's heightened pleading

requirement, then the Second Circuit's decision must be vacated. If this Court does not resolve the heightened pleading issue raised in Leatherman, then the Court should grant plenary review in this case, in order to resolve this important issue.

In Leatherman v. Tarrant Co. Narcotics Intelligence Unit, supra, 954 F.2d at 1056, the plaintiff alleged that Tarrant County's Narcotics Intelligence Unit had failed to adequately train its officers in how to deal with domestic pets while executing search warrants, and that such failure amounted to a policy resulting in constitutional harm. The Fifth Circuit dismissed the complaint, holding that the plaintiff had not met that Circuit's heightened pleading requirement for Monell claims brought pursuant to 42 U.S.C. § 1983 Id. at 1058. The Fifth Circuit stated that in order to make out a claim for inadequate training, a plaintiff would have to demonstrate

> 'at least a pattern of similar incidents in which citizens were injured ... [in order] to establish the official policy requisite to municipal liability under section 1983.'... While plaintiff's complaint sets forth the facts concerning the police conduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training.

(Id.) (citations omitted) (emphasis added). In the alternative, a plaintiff would have to show that a single incident was caused by an existing unconstitutional municipal policy. Id.

The Seventh Circuit also has a heightened pleading requirement for such claims. In Rodgers v. Lincoln Towing Service, Inc., 771 F.2d, 194, 202 (7th Cir. 1985), where the plaintiff alleged that the Chicago Police Department had a policy of placing intimidating phone calls to criminal suspects, and that the Police Commissioner failed to properly train his employees and allowed a pattern of harassment and intimidation to continue, the Seventh Circuit affirmed the dismissal of the Monell claims, because the plaintiff had alleged no facts "that would indicate problems 'systemic in nature'" (citation omitted).

Thus, for Monell claims alleging failure to train and supervise, both the Fifth and Seventh Circuits require the pleading of specific facts to show a pattern of incidents or problems resulting in the deprivation of constitutional rights arising from the municipality's policy or practice of failure to provide any or adequate training and supervision in a particular area.

On the other hand, although the Second and Fourth Circuits require such pleadings to contain some facts going beyond stating mere legal conclusions, these Circuits reject the concept of a heightened pleading requirement, and instead subscribe to the dictates of Rule 8(a) of the Federal Rules of Civil Procedure requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief".

Thus, in Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123, 124 (2d Cir. 1991), where the plaintiff alleged that inadequate training and supervision of transit police officers -- as evidenced by three internal reports of

arrest practices and other alleged, conceded or adjudicated incidents of improper arrests -- constituted a municipal policy or practice which resulted in his wrongful arrest, the Second Circuit vacated the District Court's dismissal of the complaint for failure to state a claim, based upon its reading of the requirements of Rule 8(a) of the Federal Rules of Civil Procedure. The Second Circuit went on to quote the principle enunciated in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", and that this principle should be strictly applied, especially in civil rights complaints. Id. at 123. The only limitation that the Second Circuit placed on such pleadings was that they should not be "wholly conclusory". Id. at 124.

In the instant case, the Second Circuit also enunciated guidelines to be followed in pleading and proving Monell claims of failure to train and/or supervise. The Second Circuit stated that the plaintiff must show that the policymaker knows to a moral certainty that his/her employees will confront a given situation; that the situation will present the employee with a decision that training or supervision will make less difficult, or that the policymaker is aware of a pattern of misconduct or mishandling a given situation that puts him/her on notice that training is needed in a particular area; and that lack of training in an area will frequently result in the deprivation of constitutional rights (11-12).

The Fourth Circuit, like the Second Circuit, also has a liberal pleading rule for § 1983 Monell claims, and will reject claims only if they are framed solely as legal

conclusions. In Revene v. Charles County Commissioners, 882 F.2d 870, 874-875 (4th Cir. 1989) the Court reiterated the Conley v. Gibson rule, and held that under the liberal notice-pleading requirements of the Federal Rules of Civil Procedure, a civil rights plaintiff need not be held to strict fact-pleading requirements in order to survive a motion to dismiss; rather plaintiff need only assert some general supporting facts, beyond entirely legal conclusions, that suggest specific deficiencies in the training, or that the incident alleged was not unique, or that there was a practice or custom of comparable conduct which might be charged to the deliberate indifference of a municipal policymaker. In Revene, the Fourth Circuit affirmed the District Court's dismissal of plaintiff's Monell claims because the plaintiff had failed to allege any facts suggesting training deficiencies other than the facts of the single incident in which he was involved.

The Third Circuit, on the other hand, seems to have created a hybrid rule with respect to this type of Monell claim. In Freedman v. City of Allentown, Pennsylvania, 853 F.2d 1111, 1114 (3d Cir. 1988), the Court reiterated its rule that in order to survive a motion to dismiss, the complaint had to "'contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed plaintiffs'". It also stated, however, that if the lack of specificity was due to the fact that the required information was under the control of the defendant(s), then the complaint would survive while the plaintiff was permitted to conduct a "'reasonable amount of discovery to help [plaintiff] make the necessary showing to prove her case'" (citations omitted). In that case, the Third Circuit dismissed plaintiff's Monell claims as insufficient

where she had alleged, inter alia, that the City had a policy of not instituting any procedures or systems to effectively monitor detainees with suicidal tendencies, and had failed to appropriate the necessary funds to provide adequate training to police officers in the handling of mentally disturbed suspects. Id. at 1113, 1116-1117.[4]

Applying its guidelines for pleading Canton claims and the general pleading requirements set forth in Ricciuti to plaintiff's perjury claims against the NYPD and the DA's Office, the Second Circuit held that the claims should not be dismissed and plaintiff should be permitted to pursue discovery, despite the lack of any indication of an obvious need for training and absent any allegations demonstrating that a pattern of perjury existed in either of those two offices, because it did "not appear 'beyond doubt' that

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[4] The split among the Circuits on the pleadings issue is even greater when one goes beyond Monell claims of failure to train and supervise, to consider Monell claims, in general, alleged under 42 U.S.C. § 1983. In addition to the heightened, liberal, and hybrid pleadings requirements described, above, the Ninth Circuit has completely rejected any requirement that a § 1983 plaintiff plead specific facts, finding that a complaint will sustain a motion to dismiss even if it contains "nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice". Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986). See also Evans v. McKay 869 F.2d 1341, 1349 (9th Cir. 1989); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988).

Walker [could] not prove this 'set of facts in support of his claim which would entitle him to relief'" (16-18). Under the Fifth Circuit's heightened pleading requirement, however, these claims would be dismissed, because plaintiff failed to allege either a pattern of similar incidents of perjury or any other facts indicating that the need for training and supervision in this area was obvious. See Leatherman v. Tarrant Co. Narcotics Intelligence Unit, supra, 954 F.2d at 1058.

Applying the same guidelines and pleadings rule to plaintiff's claim that the DA's Office had failed to adequately train and supervise its assistant district attorneys in how to handle exculpatory evidence, the Second Circuit held that this claim also should not be dismissed (18-19). Although plaintiff had not pled any facts showing a pattern of assistant district attorneys mishandling exculpatory evidence, and although he had not pled that the requirements of Brady v. Maryland, supra, were sufficiently new and unclear as to require training, the Court, sua sponte, found that "[b]ecause the proper course of conduct was not at all obvious in 1971 absent some training in the intricacies of Brady, a jury could find that the complete failure to train or supervise alleged here would likely result in ADAs making the wrong choices about turning over this kind of Brady material "(19).[5]

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[5] The Second Circuit affirmed the District Court's dismissal of plaintiff's claim against the NYPD for failure to train or supervise it officers on how to handle exculpatory evidence, because the police officer had turned this material over to the DA'S Office (14-16).

Given the increasing number of Monell failure to train and supervise claims, and the split among the Circuits as to what type of factual specificity is required to survive a motion to dismiss, it is extremely important that the Supreme Court resolve the issue of whether a plaintiff's pleading of a Canton claim must meet a heightened pleading standard.

II. THE SECOND CIRCUIT'S DECISION THAT THE CITY OF NEW YORK CAN BE HELD LIABLE FOR THE TRAINING AND SUPERVISION POLICIES AND PRACTICES OF THE DA'S OFFICE, BUT NOT FOR ITS DECISIONS TO PROSECUTE, DESPITE THE FACT THAT THE CITY HAS NO CONTROL WHATSOEVER OVER ANY OF THE DECISIONS OF THAT POLICYMAKER, DIRECTLY CONTRAVENES THE MANDATE AND SPIRIT OF MONELL AND ITS PROGENY.

Despite the wealth of New York State law that indicates that the DA's Office is an independent entity over which New York City has no control or influence, the Second Circuit draws a distinction, for purposes of Monell liability, between the administrative and prosecutorial functions exercised by district attorneys (20, quoting Gentile v. County of Suffolk, 926 F.2d 142, 152 n.5 (2d Cir. 1991)). Thus, while the Second Circuit recognizes that the City cannot be held liable under Monell for the prosecutorial actions exercised by members of the DA's Office, such as bringing indictments or conducting criminal trials, the Second Circuit has carved out an exception to this rule and

has found that municipal liability will lie in instances where the DA's Office trains and supervises its staff to carry out those very same prosecutorial functions (20). The exception is untenable, because the training and supervision of assistant district attorneys is integrally related to how they must handle their prosecutorial responsibilities.

The hallmark of the Supreme Court's decision in Monell is that a municipality can only be held liable for the constitutional injuries suffered by its citizens when the municipality itself acts through an official with policymaking authority, by either ordering or condoning policies or practices that result in the deprivation of constitutional rights. Monell v. New York Department of Social Services, supra, 436 U.S. at 690-694. See also Pembaur v. City of Cincinnati, 475 U.S. 469, 477-479 (1986). The Supreme Court has also made clear that the issue of who can be considered an official municipal policymaker is a question of state law. Id. at 483. Accord, City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988) (opinion of O'Connor, J.); id. at 143 (Brennan, J. concurring).

The Second Circuit's decision that the City of New York can be held liable for the training and supervision policies and practices of the DA'S Office contravenes both the mandate and spirit of these Supreme Court decisions, because the City has no control over and no input into how the district attorney runs his office, including decisions of what cases to prosecute, how to prosecute them, and how to manage the daily operations of the office. The Second Circuit's distinction between the training functions, where it would hold the City liable for the actions of the DA's Office, and the more traditional prosecutorial functions, where it

would deny liability, is an irrational one, having no relation to concepts of Monell liability.

Although the King's County District Attorney is indisputably a policymaker for his office, under New York State law New York City does not and cannot control, influence, or interfere with his decisions on how to train and supervise his staff in the handling of exculpatory evidence and perjury by witnesses during criminal proceedings. Accordingly, the Second Circuit misinterpreted New York State law when it held that New York City could be held liable, in a § 1983 Monell claim, for the DA's Office alleged failure to train and supervise its staff in these areas.

Under New York State law, the district attorney is a constitutional officer, chosen by the electors of each county (N.Y. Constit., art. XIII, §13[a]), charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected...". N.Y. Co. Law, § 700 (McKinney's 1972). It is the district attorney alone who is responsible for appointing and removing assistant district attorneys in his/her office. N.Y. Co. Law, § 930 (McKinney's 1972). Moreover it is only the governor of the State who may remove a district attorney (N.Y. Const., art. XIII § 13 [a]), or who may appoint a replacement if there is a mid-term vacancy in the office. N.Y. Co. Law § 926(2) (McKinney's 1972).

Thus, although New York State law home rule provisions classify district attorneys as county rather than state officers -- see, e.g., Kelley v. McGee, 57 N.Y.2d 522, 534, 443 N.E.2d 908, 913, 457 N.Y.S.2d 434, 438 (1982);

Fisher v. State of New York, 10 N.Y.2d 60, 176 N.E.2d 72, 217 N.Y.S.2d 52 (1969); N.Y. Public Officers Law § 2 (McKinney's 1988) -- and although in New York City the five counties are geographical subdivisions of the City, New York law is clear that its cities cannot be held liable for the decisions and conduct of members of the DA's Office in the furtherance of their duties as prosecutors. See Brown v. City of New York, 60 N.Y.2d 897, 898, 458 N.E.2d 1250, 1251, 470 N.Y.S.2d 573, 574 (1983) (where plaintiff sued the City for, inter alia, malicious prosecution, and moved for summary judgment, the Court held that it was error to apply the doctrine of issue preclusion to the civil case based on issues decided in the criminal case, because the City and the district attorney's office are separate entities and do not stand in sufficient relation to establish the key element of identity of the parties); Lee v. City of Mt. Vernon, 49 N.Y.2d 1041, 1043, 407 N.E.2d 404, 429 N.Y.S.2d 557, 558 (1980) (in suit against the city and various individuals for malicious prosecution, the Court of Appeals stated that "the decision [whether] to present the matter to the Grand Jury was that of the District Attorney, for whose acts the City is not responsible ...") (emphasis added); Whitmore v. City of New York, 80 A.D.2d 638, 640, 436 N.Y.S.2d 323, 325 (2d Dept., 1981), appeal dismissed, 54 N.Y.2d 603 (1981) (where plaintiff sued the City, inter alia, for malicious prosecution, Court cited Lee v. City of Mt. Vernon, supra, for the proposition that the City would not be responsible for prosecutor's misconduct); Morris v. City of New York, NYLJ, Jan. 1, 1992, at 24, col. 3 (Sup. Ct., N.Y. Co.) (where plaintiff sued the City for torts allegedly committed by an assistant district attorney the Court, citing Zimmerman v. City of New York, infra, held that New York City could not be held liable for conduct by members

of the New York County District Attorney's Office, even though the district attorney is classified as a local officer under the Public Officers Law and is paid by the City, because the City has no power to control the manner in which the district attorney performs his prosecutorial duties); Zimmerman v. City of New York, 52 Misc.2d 797, 800, 801, 276 N.Y.S.2d 711, 716 (Sup. Ct., N.Y. Co., 1966) (City does not have the power to direct the district attorney or to control the manner in which he performs his duties; therefore, even if statutes give the county the power to control issues of salary and budget, and even if he is classified as a local rather than a state officer, he is not a local officer for purposes of liability). Indeed, although New York City has the authority to abolish the offices of most county officials, it has no such authority with respect to the District Attorney's Office. N.Y. Const., art. 13 § 13(c).

Accordingly, because the City of New York had no control and no influence over the decisions by the DA's Office as to how to train and supervise its staff in the areas of how to handle exculpatory evidence and how to respond to suspected perjury during criminal proceedings, petitioner respectfully prays that this Court grant plenary review of this issue, in order to correct the Second Circuit's misapplication of the principles and mandate of Monell and its progeny.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
Attorney for Petitioner.

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
A. ORLI SPANIER,
of Counsel.

*Counsel of Record.

92-956

No. 92 -

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1029, 1056 or 1010

LEONARD J. KOERNER*,
STEPHEN J. MCGRATH,
A. ORLI SPANIER,
of Counsel.

*Counsel of Record

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Decision of the United States Court of Appeals
for the Second Circuit, Dated September 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1783--August Term 1991

(Argued June 26, 1992

Decided September 4, 1992)

Docket No. 92-7365

JAMES WALKER,

Plaintiff-Appellant,

- v. -

THE CITY OF NEW YORK,

Defendant-Appellee.

Before:

NEWMAN, PRATT, and WALKER,
Circuit Judges.

Appeal from order entered in the United States District Court for the Southern District of New York, John S. Martin, Jr. Judge, dismissing plaintiff's § 1983 suit for failure to state a claim upon which relief can be granted.

Reversed and remanded.

DOUGLAS S. LIEBHAFSKY (Claire D. Chapell, Wachtell, Lipton, Rosen, & Katz, of counsel) for Plaintiff-Appellant.

A. ORLI SPANIER (O. Peter Sherwood, Corporation Counsel, New York, NY Ellen B. Fishman, David Lock, of counsel) for Defendant-Appellee.

WALKER, Circuit Judge:

Plaintiff James Walker spent nineteen years in prison for a crime that it now appears he did not commit. In 1971 police officers and prosecutors covered up exculpatory evidence and committed perjury in order to insure Walker's conviction despite their knowledge of Walker's probable innocence. After unearthing facts critically undermining the state's case against him, Walker won his release from

prison in 1990. Walker then filed suit under 42 U.S.C. § 1983 against the City of New York in the United States District Court for the Southern District of New York, seeking eleven million dollars. The district court dismissed the suit for failing to state a claim upon which relief can be granted.

The question presented to us on appeal is whether a plaintiff who alleges that he has been falsely imprisoned for nineteen years has a claim for relief under § 1983 against the city that hired but allegedly failed adequately to train and supervise the police officers and prosecutors who conspired against him. When stated this way, the question seems to admit of only one answer. However, beneath the obvious equities of this case lie complex and difficult questions of federal law.

On June 1, 1970, William Powell and at least one accomplice robbed an armored truck. Powell murdered the truck's driver, Edward Kargman, while an accomplice struck a guard, Jose Ruiz, with a sawed-off shotgun, knocking him unconscious. William Powell pled guilty to felony murder in October 1971.

The police were unable to identify, much less find, Powell's accomplice until several months after the incident, when John Snider, a drug addict with a substantial criminal record, identified James Walker as the man who assaulted Jose Ruiz. Snider also told the police that Melvin Givens, a friend of Walker, had participated in the crime. Snider

was previously acquainted with Givens and knew Walker to be Givens' friend.

On April 23, 1971 Detective Robert Powell ("Detective Powell"), the police officer in charge of the investigation, arrested Walker. After the arrest, Walker took part in a police lineup. At the lineup, Jose Ruiz failed to pick out Walker and instead identified another man (apparently a police officer) as his assailant. The investigation suffered a second setback when Detective Powell and Kings County Assistant District Attorney (ADA) J. Paul Zsuffa, the lead prosecutor on the case, learned that Melvin Givens had been in prison on June 1, 1970, the date of the heist. Thus, contrary to Snider's statement, Givens could not possibly have participated in the crime.

Undeterred, ADA Zsffa and Detective Powell decided to continue efforts to prosecute Walker. In June 1971, Snider testified before a grand jury, implicated Walker, and made no mention of Givens. The grand jury indicted Walker.

Although the prosecution possessed documents revealing both Snider's prior false statements and Ruiz's failure to identify Walker, no such documents nor any record of either incident was ever turned over to the defense. Instead, in a pre-trial Wade hearing, ADA Zsuffa appeared as a witness and denied that the April 23 lineup had taken place. At the same hearing, Detective Powell claimed that he could not recall the lineup. At trial, Snider testified against Walker without mentioning Givens and

Detective Powell testified to the consistency between Snider's statements after the incident and at trial, despite the glaring discrepancy between them.

On October 19, 1971 a jury convicted Walker of murder. In April 1972, the court sentenced Walker to a term of twenty years to life imprisonment. Years later, Walker learned of the exculpatory evidence concealed in this case. On January 2, 1990 Walker moved in state court for an order vacating his conviction. With the consent of the Kings County District Attorney's office, the court entered an order dismissing the indictment, with prejudice, and vacating the conviction.

After winning his release, Walker sued New York City (the City) under 42 U.S.C. § 1983, alleging that the City had failed adequately to train and supervise the police and the district attorney's office. Specifically, Walker asserted that the City should have trained police officers and ADAs not to commit or suborn perjury and not to suppress exculpatory evidence. Walker asserted that the City's failure to train constituted deliberate indifference to his constitutional rights and proximately caused his wrongful imprisonment.

On the City's motion, the district court dismissed Walker's complaint. The district court reasoned that failure to train and supervise City employees can only constitute deliberate indifference by the City where it should be obvious to City policymakers that training and supervision is required. The district court concluded that there was no

obvious need to train prosecutors and police officers not to commit or suborn perjury, since that should be clear to all without training. Similarly, the district court found that the prosecutor's duty to turn over exculpatory material to the defense was sufficiently obvious as not to require training. Finally, the district court concluded that whether or not it was obvious that police officers should turn over exculpatory evidence, any failure to train in this regard did not proximately cause Walker's injuries, since the police did turn over the exculpatory evidence to the prosecution and only the prosecutor had a duty to turn the evidence over to the defense. Accordingly, the district court dismissed Walker's complaint. This appeal followed.

II

This appeal requires us to address a basic question of section 1983 litigation: when are municipalities liable for the unconstitutional acts of municipal employees? Until 1978, the answer to that question was simple--never. See Monroe v. Pape, 365 U.S. 167, 187 (1961). In Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Supreme Court overruled Monroe and declared that Congress had not intended to exempt municipalities from liability in all cases. The Monell court also concluded that Congress had not intended to expose municipalities to respondeat superior liability for all misdeeds by municipal employees. Rather, it is only when the municipality itself commits the misdeed, that is, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436 U.S. at 694.

Monell raised several elusive questions. What is a government policy or custom? Who is a policymaker Can a single incident constitute an unlawful policy? In developing answers to these questions, the Supreme Court has been mindful of maintaining a delicate balance between insuring that municipalities are liable for their own misdeeds and avoiding respondeat superior liability. See St.Louis v. Praprotnik, 485 U.S. 112, 131 (1988) (opinion of O'Connor, J.); Pembaur v. Cincinnati, 475 U.S. 469, 477 (1986); Oklahoma City v. Tuttle, 471 U.S. 808, 830 (1985) (opinion of Brennan, J.).

In Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the Court considered whether evidence of a single incident of use of excessive force by the police could, without more, establish a municipal policy of failing to properly train and supervise police officers. The Court concluded that to allow evidence of a single incident to establish inadequate training, without any proof relating to the nature of the training itself, would "unduly threaten [a municipality's] immunity from respondeat superior liability." Id. at 830 (opinion of Brennan, J.). Instead, to establish inadequate training, plaintiffs must put forward some evidence that the City itself has acted or consciously not acted. Id. at 832 (opinion of Brennan, J.).

In Pembaur v. Cincinnati, 475 U.S. 469 (1986), the Court clarified that Tuttle should not be taken to mean that a single act could never be the basis of municipal liability. So long as the single challenged act was the decision of a municipal policymaker, the municipality could be held liable. Id. at 480. The Pembaur court fractured, however, on the precise definition of a policymaker for § 1983 purposes. A plurality of the Court suggested that a policymaker was one who, under state law, "possesses final authority to establish municipal policy with respect to the action ordered." Id. at 481 (opinion of Brennan, J.). Two concurring justices questioned whether this definition was too broad. See id. at 486 (White, J. concurring); id. at 491 (O'Connor, J. concurring).

The Court revisited the policymaker question in St. Louis v. Praprotnik, 485 U.S. 112 (1988). There, the Court affirmed that state law provides a proper source for assessing who possesses final authority to establish municipal policy. Id. at 124 ("the identification of policymaking officials is a question of state law") (opinion of O'Connor, J.); id. at 143 ("state law will naturally be the appropriate starting point") (Brennan, J. concurring). A plurality suggested that where the municipal policymaker delegated some discretion to subordinates, the city could be liable only for the policymaker's delegation and supervision, not the subordinate's exercise of authority. The plurality noted, however, that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because

their decision is final." Id. at 127 (opinion of O'Connor, J.).

In sum, Tuttle and Pembaur require plaintiffs to allege actual conduct by a municipal policymaker. Praprotnik insures that only actions by officials relatively high up in the municipal hierarchy will produce municipal liability. The combination of the three cases necessarily molds many § 1983 claims against municipalities into "failure to train" or "failure to supervise" claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.

In City of Canton v. Harris, 489 U.S. 378 (1989), the Court addressed the dimensions of municipal liability for failure to train or supervise. Harris sued Canton alleging that the city had failed to adequately train its police as to when to summon medical care for an injured detainee. The Supreme Court ruled that a claim of inadequate training will trigger municipal liability only where "the failure to train amounts to deliberate indifference to the rights" of those with whom municipal employees will come into contact. Id. at 388.

The Court explained that "deliberate indifference" required that city policymakers made a "deliberate choice ... from among various alternatives" not to fully train employees. Id. at 389. Such a deliberate choice could be shown where "in light of the duties assigned to specific officers or employees the need for more or different

training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id.

The Court offered as an example of deliberate indifference a municipality's failure to train police officers on the proper use of deadly force. The Court noted that "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." Id. at 390n. 10. Moreover, "[t]he city has armed its officers with firearms, in part to accomplish this task." Id. In such a situation, "the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be 'so obvious' that failure to do so would properly be characterized as 'deliberate indifference' to constitutional rights." Id.

Even where the need to train or supervise would not be obvious to a stranger to the situation, a particular context might make the need for training or supervision so obvious that a failure to do so would constitute deliberate indifference. Thus, the Court suggested that "[i]t could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." Id.

From these examples, we discern three requirements that must be met before a municipality's failure to train or

supervise constitutes deliberate indifference to the constitutional rights of citizens. First, the plaintiff must show that policymaker knows "to a moral certainty" that her employees will confront a given situation. Id. Thus, a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.

Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is history of employees mishandling the situation. Whether to use deadly force in apprehending a fleeing suspect qualifies as a "difficult choice" because more than the application of common sense is required. Instead, police officers must adhere to the rule of Tennessee v. Garner, 471 U.S. 1 (1985), that deadly force may constitutionally be applied to a fleeing suspect only when "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm" and when "where possible, some warning has been given." Id. at 11-12. A choice might also be difficult where, although the proper course is clear, the employee has powerful incentives to make the wrong choice.

Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights. City of Canton, 489 U.S. at 390. Thus, municipal policymakers may appropriately concentrate training and supervision resources

on those situations where employee misconduct is likely to deprive citizens of constitutional rights.

Where the plaintiff establishes all three elements, then we think it can be said with confidence that the policymaker should have known that inadequate training or supervision was "so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id. With these principles in mind, we examine Walker's complaint to discern whether it states a claim upon which relief can be granted.

III

In reviewing a motion to dismiss on the pleadings, "the factual allegations in the complaint must be accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff." Frazier v. Coughlin, 850 F.2d 129, 129 (2d Cir. 1988). The district court should grant such a motion only if, after viewing plaintiff's allegations in this favorable light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991).

Plaintiff's complaint makes the following allegations. First, Walker alleges that the district attorney's office failed to adequately train and supervise ADAs with respect to the obligation to turn over exculpatory evidence and to avoid the introduction of perjured evidence. Second, Walker

asserts that the police department failed to adequately train and supervise officers as to the proper handling of exculpatory information and the duty to provide (and seek) truthful and accurate testimony. Walker also suggests that police and ADAs were not trained about a host of more general obligations. Distilled in light of the facts of this case, each of these more general allegations effectively restates the allegations listed above. We will consider these allegations in turn to determine whether any states a claim upon which relief can be granted.

A. Claims against the police department.

Walker alleges that the police department failed to train and supervise police officers in two areas--the obligation not to commit or suborn perjury, and the duty to turn over exculpatory evidence. The district court found that neither allegation stated a claim upon which relief could be granted. With respect to the exculpatory evidence, the district court concluded, on the facts alleged in the complaint, that the police had fully complied with their constitutional obligations by turning over exculpatory evidence to the prosecutors. With respect to the perjury charge, the district court found that any failure to train did not constitute deliberate indifference, since "[a]ny reasonable police officer or lay person would be expected to know this without training."

1. Exculpatory evidence.

Walker alleges that the police department had no policy on the proper handling of the exculpatory evidence. If true, this might, in the proper case, provide the basis for a deliberate indifference claim under the standards laid out above. On the facts alleged here, however, it is clear that any failure to train or supervise the police as to the handling of exculpatory evidence did not cause Walker's injury.

Walker alleges that Detective Powell conspired with ADA Zsuffa to suppress exculpatory evidence and to elicit perjured testimony. Walker does not allege, however, that Detective Powell or any other police officer concealed any exculpatory evidence from the prosecution team. Thus, in order for the police department's failure to train to have any causal connection to Walker's injury, it must be the case that police officers have an obligation with respect to exculpatory evidence beyond disclosing that evidence to the prosecutor. We do not believe that such an obligation exists.

The constitutional duty to disclose exculpatory evidence to the defense has its roots in Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the Court held that "the suppression by the prosection of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady does not discuss the relative disclosure obligations of police and prosecutor.

Subsequent cases, however, have suggested that the police satisfy their obligations under Brady when they turn exculpatory evidence over to the prosecutors. See Campbell v. Maine, 632 F.Supp. 111, 121 (D. Me. 1985), aff'd, 787 F.2d 776 (1st Cir. 1986); Hauptmann v. Wilentz, 570 F. Supp. 351, 389 (D.N.J. 1983), aff'd, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986). But see Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), vac'd on other grounds, 424 U.S. 961 (1976). We agree. It is appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes Brady material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion. It also would ignore the fact that the defendant's appropriate point of contact with the government during litigation is the prosecutor and not those who will be witnesses against him. Since Walker has alleged that the police shared all exculpatory evidence with the prosecutors, Walker's claim against the police relating to the suppression of exculpatory evidence fails to state a claim upon which relief can be granted. We affirm the district court's dismissal of this element of Walker's complaint.

Walker contends, however, that we should not read his allegations so strictly. He points out that, contrary to his allegations, discovery may reveal that the police did suppress evidence from the prosecution. This is not really an objection to the dismissal of this portion of the complaint, as pled. Rather, Walker is asserting a right to

replead the complaint in the event later discovery yields new evidence contradicting his pleadings. We think such a request to replead should properly be addressed to the district court on remand as circumstances may warrant.

2. Perjury.

Walker also contends that the police department had an obligation to train and supervise officers not to commit perjury or aid in the prosecution of the innocent. The district court rejected these claims on the theory that the police officer's obligation not to commit or suborn perjury or prosecute the innocent are obvious.

Walker contends that his allegations meet the deliberate indifference threshold set by City of Canton. That is, city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent. Moreover, a failure by police officers to resist these opportunities will almost certainly result in deprivations of constitutional rights. Accordingly, Walker contends, that just as municipalities have a duty to train officers in the constitutional limits on the use of force in apprehending criminals, so too must municipalities train and supervise their officers with respect to the obligation not to commit perjury or assist in the prosecution of the innocent.

Walker's argument misses a crucial step. It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to

citizens. As laid out above, City of Canton also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response--to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent--is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

That general rule, however, does not apply in every case. While it is reasonable for city policymakers to assume their employees possess common sense, where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by doing so. If Walker can produce some evidence that policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision, his claim can survive summary judgment.

Walker has not expressly alleged a history of police perjury. Nonetheless, it does not appear "beyond doubt" that Walker cannot prove this "set of facts in support of his claim which would entitle him to relief." Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991). Walker should be allowed to pursue discovery in order to determine whether there was a practice of condoning perjury (evidenced perhaps by a failure to discipline for perjury) or a pattern of police misconduct sufficient to require the police department to train and supervise police

officers to assure they tell the truth. Accordingly, we reverse the district court's dismissal of Walker's claims alleging the city's deliberate indifference to the need to train and supervise the police not to commit perjury or assist in the conviction of the innocent.

B. Claims against the District Attorney's Office.

Walker assails the District Attorney's office's lack of training and supervision relating to ADAs' obligations to disclose exculpatory evidence and to avoid the use of perjured evidence. The district court concluded that Walker had failed to state a claim against the municipality, since each obligation should have been obvious without training. With respect to the use of perjured evidence, we disagree with the district court for the reasons set out above in the discussion of the police training claim. We also disagree with the district court's determination that a prosecutor's obligations under Brady are so obvious as to require no training.

Reading Walker's complaint in a light most favorable to Walker, we conclude that a complete failure by the DA in 1971 to train ADAs on fulfilling Brady obligations could constitute deliberate indifference sufficient to give rise to § 1983 municipal liability. First, the district attorney knows to a moral certainty that ADAs will acquire Brady material. Second, contrary to the district court, we do not think that in 1971, just seven years after Brady was decided, that the Brady standard was so obvious or easy to

apply as to require, as a matter of law, no training or supervision.

Indeed, the evidence withheld in this case, though clearly Brady material, was not of the sort that one would obviously turn over, absent some knowledge of Brady. That is, there might have been no need in 1971 to train ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime. But, it might not have been obvious in 1971 that ADAs should turn over all information of the sort at issue here--evidence impeaching the accusing witness or revealing a lineup misidentification but not directly establishing the innocence of the accused. Because the proper course of conduct was not at all obvious in 1971 absent some training in the intricacies of Brady, a jury could find that the complete failure to train or supervise alleged here would likely result in ADAs making the wrong choices about turning over this kind of Brady material. We express no view as to whether such a jury finding would be supportable in other time periods or with respect to other kinds of exculpatory evidence. Finally, withholding Brady material will virtually always lead to a substantial violation of constitutional rights. We think Walker has adequately alleged deliberate indifference by the district attorney.

IV

Having determined that Walker has properly alleged deliberate indifference by the district attorney, the question remains whether or not the district attorney is a municipal

policymaker. The City contends that the district attorney is a state official, and therefore that his deliberate indifference cannot trigger municipal liability.

The City finds some support for its view in Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), cert. denied, 488 U.S. 1014 (1989). There, plaintiff brought a § 1983 suit seeking to hold the County of Onondaga liable for an ADA's attempt to prosecute the plaintiff after a grand jury declined to return an indictment. We held that "when prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State, not the county." Id. at 77. Accordingly, we ruled that a district attorney's misconduct in prosecuting an individual could not give rise to municipal liability. Baez, however, involved a challenge to the decision by an ADA to prosecute an individual and the district attorney's endorsement of that decision. Here, by contrast, Walker is challenging the district attorney's management of the office--in particular the decision not to supervise or train ADAs on Brady and perjury issues.

In Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991), we held that a county could be held liable for a county district attorney's long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing. In Gentile, we confined Baez to challenges to "specific decision[s] of the District Attorney to prosecute." Id. at 152n.5. We think Gentile, not Baez, controls here. Where a district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker.

There is an added complexity in this case because Walker is suing the City of New York, not Kings County. It is possible that an official could be a policymaker for one of New York City's constituent counties without being a policymaker for the City. However, Walker alleged, and the City conceded below, that the county district attorneys within the City have final, discretionary authority to implement training and supervision within their own office. Since the City has conceded that no City official has veto authority over training or supervision decisions by the county district attorney, we hold that the Kings County District Attorney acted as a municipal policymaker in this case. See Pembaur, 475 U.S. at 481-85 (opinion of Brennan, J.). Accordingly, Walker's allegations of deliberate indifference by the District Attorney provide a proper basis for holding the City liable.

Conclusion

The Supreme Court has made clear that § 1983 does not subject municipalities to liability whenever municipal employees go astray. It is only when the municipality itself wreaks injury on its citizens that municipal liability is appropriate. Here, plaintiff Walker has catalogued a host of misdeeds by city employees that led to his wrongful imprisonment. Some of these misdeeds relate to such basic norms of human conduct--the duty not to lie or persecute the innocent--that in the ordinary case a municipal policymaker need not expend precious resources on training or supervision but can instead rely on the common sense of her employees. However, in this case discovery may reveal

a pattern of misconduct sufficient to turn such apparently reasonable reliance into deliberate indifference. In that event, liability may fairly be laid at the City's doorstep. Even absent such evidence, we think that Walker has properly alleged that a particular municipal action--the failure to train and supervise prosecutors to insure that they meet their constitutional obligation to turn over exculpatory material to the defense--caused his injuries. Accordingly, we conclude that the district court erred in dismissing Walker's complaint. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Order and Judgment of the United States Court of Appeals for the Second Circuit, Entered September 4, 1992

United States Court of Appeals
FOR THE
SECOND CIRCUIT

SDNY
91-cv-2327
MARTIN

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of September, one thousand nine hundred and ninety-two.

PRESENT: HON. JON O. NEWMAN
HON. GEORGE C. PRATT
HON. JOHN M. WALKER, JR.

Circuit Judges,

JAMES WALKER,

92-7365

Plaintiff-Appellant,

- v -

THE CITY OF NEW YORK,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED** and **DECREED** that the order of said district court is reversed and the actin be and it hereby is remanded to that said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro
Staff Attorney

Memorandum Order and Opinion of the United States District Court for the Southern District of New York, Dated January 7, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES WALKER,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

----------x

91 Civ. 2327 (JSM)

MEMORANDUM ORDER AND OPINION

JOHN S. MARTIN, JR., District Judge:

Plaintiff served 19 years in jail as a result of a conviction which was ultimately set aside after plaintiff obtained exculpatory evidence which he alleges was knowingly suppressed by the prosecution. Accepting the allegations of the complaint as true, plaintiff is someone for whom the law should provide a remedy. Unfortunately for plaintiff, however, the injury which he suffered is not one for which he is entitled to redress against this defendant, The City of New York, pursuant to 42 U.S.C. § 1983. For

that reason, the motion of The City of New York to dismiss the complaint is granted.

The complaint alleges that the plaintiff was prosecuted and convicted in proceedings that were tainted throughout by the suppression of exculpatory evidence by police officers and a prosecutor, by the knowing use of perjured testimony, including false testimony of police officers in the grand jury and in pretrial proceedings. All those allegations make out a cause of action under 42 U.S.C. § 1983 against the individual parties. They are not named as individual defendants in the action before the Court. The only defendant in this complaint is the City of New York ("the City").

Plaintiff attempts to make out a claim against the City by general allegations throughout the complaint that both the Police Department and the Office of the District Attorney of Kings County failed to appropriately train and instruct their personnel and lacked policies and procedures concerning such things as the prosecutor's duty to disclose exculpatory material and to avoid the introduction of perjured testimony.

In Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court held that a municipality could be found liable for the deprivation of constitutional rights. A municipality, however, is not responsible under the doctrine of respondeat superior for the acts of its employees acting within the scope their authority, but rather the municipality itself must inflict the injury to incur liability. City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989). A city only is responsible when its municipal

policy causes the constitutional violation. Monell, 436 U.S. at 694; 98 S. Ct. at 2037-38.

The Supreme Court in City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989), clarified that inaction as well as action by a municipality could result in municipal liability under Section 1983. The Court ruled that in some instances a city's failure to adequately train its employees could constitute municipal policy and subject the city to a Section 1983 action. City of Canton, 489 U.S. at 387, 109 S. Ct. at 1204. However, a lack of training only rises to this level if "the city's failure to train amounts to deliberate indifference to the constitutional rights of its inhabitants." City of Canton, 489 U.S. at 392, 109 S. Ct. at 1206. A city exhibits "deliberate indifference" when the need for training is "obvious" or when, although "the need for training may not be obvious from the outset, . . . a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements." City of Canton, 489 U.S. at 396-97, 109 S. Ct. at 1209 (O'Connor, J.; Scalia, J.; Kennedy, J. concurring in part and dissenting in part); see also City of Canton, 489 U.S. at 390 n. 10, 109 S. Ct. at 1205 n. 10.

At the pleading stage of a Section 1983 action a plaintiff must make a "short and plain statement of the essential elements of his claim in his complaint [but] is not required to set out the facts in detail." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); see also Ricciuti v. New York City Transit Authority, 941 F.2d

119, 123 (2d Cir. 1991).[1] However, what is an adequate "short and plain statement" depends on the case at hand, and the type of claim. With respect to a Monell claim "an allegation of municipal policy or custom would be insufficient if wholly conclusory." Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991).

I. Plaintiff's Allegations against the Kings County District Attorney's Office

Plaintiff asserts that the District Attorney's Office failed to instruct Assistant District Attorneys as to "(i) their obligations to recognize and disclose exculpatory information and to avoid the use of perjured evidence; (ii) their obligations otherwise to safeguard and protect the Constitutional rights of accused persons; and (iii) their fundamental duty as prosecutors to avoid unjust convictions (even at the expense of "losing cases.")" Plaintiff also contends that the Office lacked written policies, procedures or manuals regarding these areas. Plaintiff alleges that this deficient training and a lack of supervision of Assistant District Attorneys' handling of exculpatory material resulted in the improper conduct of the prosecutor and consequently the deprivation of plaintiff's constitutional rights.

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[1] However, to survive a motion to dismiss the complaint must "make specific allegations indicating a deprivation of rights." Fonte v. Board of Managers, 848 F.2d 24, 25 (2d Cir. 1988); accord Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987); Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987). In the case at hand the plaintiff has adequately pleaded such a deprivation. The issue is whether his pleading of municipal policy is sufficient to withstand defendant's motion to dismiss.

The Court finds that plaintiff does not allege sufficient facts to establish that the alleged failures to train, supervise, or set out policy reflected the District Attorney's Office's "deliberate indifference" to the rights of New York City residents. The complaint does not allege a pattern of constitutional violations involving the use of perjured testimony or a mishandling of exculpatory materials which could have put the District Attorney's Office on notice regarding a need for this training. A reasonable District Attorney might reasonably assume that lawyers in the course of their legal education and preparation for the bar would learn that prosecutors should not use perjured testimony, and should not hide evidence helpful to the defense or otherwise endeavor to convict innocent persons. Thus, even taking the plaintiff's factual assertions as true, the plaintiff does not establish that the lack of training or supervision reflected the defendant's "deliberate indifference" to the possibility that such lack of training would result in New York residents being deprived of their constitutional rights. The plaintiff's allegations are merely conclusory, and therefore fail to meet the requirements for pleading a Section 1983 claim. See Ricciuti, 941 F.2d at 123; McDonald v. Reid, 1991 WL 51055 (S.D.N.Y 1991).

II. Plaintiff's Allegations against the Police Department

The plaintiff levies similar charges of inadequate training against the Police Department of Kings County. Again he is seeking to show that poor training led to constitutional violations, and that the lack of training rises to the level of a municipal policy. He first accuses the Police Department of having no written policies, procedures or practice guides and giving insufficient training to its

personnel regarding "(i) the proper handling of exculpatory information, and more generally, the protection of Constitutional rights of accused persons; (ii) the proper handling of pretrial statements of prosecution witnesses; and (iii) the basic duty of the police, as an investigative agency, to pursue not only the conviction of the guilty but the exoneration of the innocent."

First, plaintiff's allegation that the Police Department's policies concerning the handling of exculpatory evidence were inadequate is unavailing because it is irrelevant under the facts alleged in the amended complaint. The plaintiff does not claim that the Police Department withheld the exculpatory information from the prosecutor. In fact, the complaint indicates that the Assistant District Attorney was fully aware of the existence and nature of the exculpatory material. A policeman fulfills his Brady obligation by turning over to the prosection any exculpatory information. He does not have an independent duty to reveal this information to the defense. Campbell v. Maine, 632 F. Supp. 111, 121 (D. Me. 1985) ("there is no independent duty of a police officer or investigative officer to disclose exculpatory information to a defendant. . . . The only duty of a police officer in possession of exculpatory information is to turn it over to the prosecutor."), aff'd 787 F.2d 776 (1st Cir. 1986); Hauptmann v. Wilentz, 570 F. Supp. 351, 389 (D.N.J. 1983) ("We are aware of no authority for the proposition that an FBI investigator has an independent duty under Brady to disclose information to defense counsel, or to correct the courtroom testimony offered by other witnesses at trial."), aff'd, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986). Thus, the plaintiff does not have a cause of action against the City on this basis, since

the police officers fulfilled their obligations by disclosing the exculpatory evidence to the prosecutor.

Plaintiff's second contention regarding the inadequate training of police officers is essentially equivalent to his first. According to the complaint, the police and prosecutor mishandled the pretrial statement of a prosecution witness by failing to divulge exculpatory information relating to it.

Lastly, plaintiff's third assertion also fails to state grounds for a Monell claim. Although this allegation refers to a duty of the police "to pursue not only the conviction of the guilty but the exoneration of the innocent," considering the context of the complaint, plaintiff essentially is arguing that the police should not attempt to convict innocent people.[2] This proposition should be obvious to all without any training.

Plaintiff further alleges that the Police Department's failure to train its employees or have policies, procedures or practice guides regarding "how to respond if confronted by unlawful, unconstitutional or otherwise improper conduct on the part of District Attorney's Office personnel in the course of . . . investigations or

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[2] The plaintiff's most serious charges against the police allege they facilitated the conviction of an innocent man by perjuring themselves. To the extent that plaintiff is arguing that the police should affirmatively act to exonerate the innocent, rather than merely refrain from assisting in convicting innocent people, in the context of this case he must be referring to an alleged duty to reveal exculpatory material. This has already been considered above.

prosecutions" resulted in the breach by police officers of their obligations not to conspire with, or aid and abet District Attorney personnel in the violation of their disclosure duties. Even assuming such an obligation on the part of a police officer, the Court finds that the need for the training described above is far from obvious. The Court perceives no reason, nor does the complaint put forth a reason, for the Police Department to have anticipated improper conduct emanating from the District Attorney's Office. Furthermore, the complaint does not make any specific allegations regarding past misbehavior on the part of the District Attorney's Office which would have put the Police Department on notice of the need to train its employees regarding how to deal with such improper conduct.

For same reasons the Court finds no merit in plaintiff's Monell claim based on the alleged failure of the Police Department to instruct its employees not to perjure themselves and to seek only truthful testimony from non-police witnesses. Any reasonable police officer or lay person would be expected to know this without training.

Thus, as with the District Attorney's Office, even taking the plaintiff's factual assertions as true, the plaintiff does not establish that the alleged lack of training or supervision of police officers reflected the Police Department's "deliberate indifference" to the possibility that such lack of training would result in New York residents being deprived of their constitutional rights.

In view of the foregoing ruling, the Court need not reach the separate issue raised by the City as to whether the City may held liable for the actions of the

District Attorney of Kings County in a 1983 action. The City cites Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), cert. denied Baez v. County of Onondaga, 488 U.S. 1014, 109 S. Ct. 805 (1989), in support of its contention that for purposes of Section 1983 liability a county, or in this case a city, cannot be said to be responsible for the conduct of the District Attorney since they cannot control his action and he is fact only responsible to state authorities. On the other hand, plaintiff cites Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) in support of their claim that liability may be imposed on a county or city for the malicious prosecution of an individual based on a history of negligent disciplinary practices.

For the foregoing reasons, the complaint is dismissed. Since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b) (6) motion, leave to replead plaintiff's federal claims will not be granted. Therefore, the federal causes of action are dismissed with prejudice. The state claims, however, may be refiled in state court.

SO ORDERED.

Dated: January 7, 1992

JOHN S. MARTIN, JR. U.S.D.J.

Judgment of the United States District Court for the Southern District of New York, Entered January 15, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES WALKER,

Plaintiff,

- against -

91 CIVIL 2327 (JSM)

THE CITY OF NEW YORK,

JUDGMENT

Defendant.

----------x

Defendant having moved to dismiss the complaint, and the said motion having come before the Honorable JOHN S. MARTIN, U.S.D.J., and the Court thereafter on January 13, 1992, having rendered its memorandum order and opinion (#69187); granting defendant's motion to dismiss and dismissing the complaint, since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b)(6) motion, leave to replead plaintiff's federal causes of will not be granted, and therefore dismissing the federal causes of action with prejudice, the state claims, however may be refiled in state court, it is,

ORDERED, ADJUDGED AND DECREED: That defendant's motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed, and it is further,

ORDERED, that leave to replead plaintiff's federal claims will not be granted, since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b)(6) motion, and it is further,

ORDERED, that the federal causes of action be and they are hereby dismissed with prejudice, and it is further,

ORDERED, that the state claims may be refiled in state court.

DATED: NEW YORK, NEW YORK
January 15, 1992

_____
Clerk

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injury in an action at law, suit in equity, or other proper proceedings for redress.

FED. R. CIV. P. 8

* * *

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

N.Y. Constit., Art. 13 § 13

* * *

(a) Except in counties in the City of New York and except as authorized in section one of article nine of this constitution, registers in counties having registers shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require;... The governor may remove any elective sheriff, county clerk, district attorney or register within the term for which he shall have been elected;... In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct....

* * *

(c) The city of New York is hereby vested with power from time to time to abolish by local law, as defined by the legislature, the office of any county officer within the city other than judges, clerks of counties and district attorneys.... The provisions of article nine shall not prevent the legislature from passing general or special laws prescribing or affecting powers and duties of such city officers or such courts or clerks to whom or which functions of such county officers shall have been so assigned, in so far as such powers or duties embrace subjects not relating to property, affairs or government of such city.

N.Y. COUNTY LAW § 926

* * *

2. There shall continue to be appointed by the governor a district attorney in each of said counties, when a vacancy shall occur in such office, and the person so appointed shall hold office until the last day of December succeeding the first election thereafter at which such vacancy can be filled by election.

N.Y. COUNTY LAW § 930

The district attorney of each county contained within the city of New York is hereby vested with the power to appoint and at pleasure to remove any assistant district attorney attached to his office. All deputy assistant district attorneys shall become and hereafter be known as assistant district attorneys. The number of assistant district attorneys and the salary paid to any assistant district attorney may be increased or decreased by the mayor of the city of New York with the consent of the district attorney.

N.Y. PUBLIC OFFICERS LAW § 2

The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-

president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

No. 92-956

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF NEW YORK,

Petitioner,

vs.

JAMES WALKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLAS S. LIEBHAFSKY
Counsel of Record
PAUL K. ROWE
CLAIRE D. CHAPPELL
WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Respondent
299 Park Avenue
New York, New York 10171
(212) 371-9200

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly hold that the specific factual allegations set forth in Respondent's complaint state a claim under 42 U.S.C. § 1983?

2. Did the Court of Appeals properly conclude that the Kings County District Attorney acted as a City policymaker under the facts of this case?

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APPENDIX

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No. 92-956

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF NEW YORK,

Petitioner,

vs.

JAMES WALKER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 1971, a New York City Police Detective and prosecutors from the Kings County District Attorney's Office got together to conceal material exculpatory evidence. Petitioner-respondent James Walker in consequence served nineteen years in prison for a felony murder he had nothing to do with. In 1990, having finally obtained the suppressed exculpatory evidence, Walker successfully moved to have his conviction vacated and the

underlying indictment dismissed. Complaint ¶¶ 22-29, 31-33, 36.[1]

The relevant facts, as set forth in Walker's complaint, are as follows:

On June 1, 1970, William Powell and at least one accomplice robbed an armored truck, murdered the driver and struck the guard, Jose Ruiz, with a sawed-off shotgun. Powell was arrested in mid-April 1971. He pled guilty to the murder in October 1971. Complaint ¶¶ 6-8, 14.

A purported eyewitness, John Snider, came forward in the fall of 1970. Snider was a long-term drug addict with a significant criminal record; he came forward only after a financial reward had been offered. Snider claimed that Walker and Walker's friend, Melvin Givens — both known to Snider from the neighborhood — had participated in the robbery/murder. Snider's word was, and remained, the only "evidence" that in any way implicated Walker. Complaint ¶¶ 10-12, 14.

On April 23, 1971, Walker was arrested by Detective Robert Powell of the New York City Police Department ("NYPD"). That evening Walker participated in a stationhouse lineup conducted by Kings County Assistant District Attorney J. Paul Zsuffa. The surviving victim, Ruiz, was present. Not only did Ruiz fail to identify Walker as his assailant; he affirmatively so identified a lineup participant other than Walker. Both Zsuffa and Det. Powell knew these facts; moreover, Zsuffa took a contemporaneous "Q&A" statement from Ruiz concerning the lineup. Complaint ¶¶ 16, 17.

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1. References to "Complaint ¶ __" are to Respondent's Amended Complaint (the "Complaint"), which is reprinted as Appendix A hereto.

Equally important, Zsuffa and Det. Powell had also learned by April 23 that Givens, the second man accused by Snider, might actually have been incarcerated on the date of the crime. Within a few days, the fact of Givens' crime-date incarceration was confirmed. Accordingly, as was then apparent, Givens could not have participated in the crime, and Snider's "eyewitness" account (and overall credibility) was completely discredited. Complaint ¶¶ 13, 18-20.

Nonetheless, Det. Powell, Zsuffa and other police and prosecutorial personnel determined to go forward with the case against Walker. In so doing, they committed and suborned perjury, and failed to turn over documents, in order to conceal from Walker, his attorney, the Kings County Grand Jury and the trial court (a) that Snider had falsely accused Givens, and (b) that Ruiz had identified someone other than Walker in the lineup. At Walker's October 1971 *Wade* hearing, Zsuffa falsely swore that the April 23 lineup had never taken place, and Det. Powell perjuriously denied any recollection of the lineup or awareness of lineup records. In addition, Snider's grand jury and trial testimony was crafted so as to omit all mention of Givens; and despite that omission, Det. Powell assured the trial jury that Snider's testimony was consistent with his Fall 1970 story. Complaint ¶¶ 22-29.

The police and prosecutorial misconduct at bar were a direct consequence of training and supervision deficiencies amounting to deliberate indifference on the part of New York City policy makers to the Constitutional rights of Walker and other citizens of the municipality. Complaint ¶¶ 36, 39-43.

In 1991, Walker sought redress by bringing this suit against the City pursuant to 42 U.S.C. § 1983 and New York State common law. On January 7, 1992, the United States District Court for the Southern District of New York issued a memorandum order and opinion dismissing Walker's federal claims with prejudice

pursuant to Fed. R. Civ. P. 12(b)(6). (25-33).[2] On September 4, 1992, the United States Court of Appeals for the Second Circuit reversed the District Court's order. (1-22).

REASONS FOR DENYING THE PETITION

I.

THE ALLEGATIONS OF THE COMPLAINT ARE SUFFICIENT EVEN UNDER A "HEIGHTENED" PLEADING RULE.

The task of a federal court reviewing the sufficiency of a complaint is necessarily a limited one. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Furthermore, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A § 1983 "failure to train" claim against a municipality must allege (as does Walker's complaint) that the municipality's training or supervision deficiencies were so egregious as to bespeak a "deliberate indifference" to constitutional rights. *See Canton v. Harris*, 489 U.S. 378, 389 (1989). There are, however, no special pleading rules for such claims. *Cf.* Rule 9(b), Fed. R. Civ. P. Accordingly, a complaint stating such a claim need only contain "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). *See also* Rule 80 and Forms 10, 14, Fed. R. Civ. P.

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2. Numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

The "heightened" pleading requirement adopted by the Fifth Circuit in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir.), *cert. granted*, 112 S. Ct. 2989 (June 22, 1992), has no basis in the Federal Rules. If such a "heightened" pleading rule is to be imposed, it must be pursuant to the normal procedures for amendment of those Rules. *See* 28 U.S.C. §§ 2072-2074.

Even if a "heightened" pleading requirement could somehow be judicially imposed for the special benefit of municipal § 1983 defendants, however, Walker's complaint clearly would withstand dismissal. Accordingly, this is not an appropriate case for certiorari on the "heightening" issue.

A fair reading of the Complaint discloses that Walker's core "rights deprivation" allegations are those setting forth *Brady* violations on the part of Kings County ADAs. And, as to those central "District Attorney" *Brady* allegations,[3] the Complaint amply details circumstances amounting to actionable municipal "deliberate indifference". Thus, the pleading alleges:

> (a) that, at the time of Walker's trial, the District Attorney's Office "had *no* written policies, procedures or practice guides concerning . . . the prosecutor's duty to disclose exculpatory material," Complaint ¶ 39(e) (emphasis added);
>
> (b) that the District Attorney's Office, at the relevant time, had "*no* training program of any significance for incoming Assistant District Attorneys" and accordingly

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3. The Second Circuit held that Walker's "*police*" *Brady* allegations failed because the police have no obligation with respect to exculpatory evidence beyond disclosing it to the prosecutor. (14-15). Walker has cross-petitioned on this point.

"wantonly failed to appropriately train" the ADAs in question as to "their obligations to recognize and disclose exculpatory information", Complaint ¶ 39(d) (emphasis added);

(c) that the District Attorney's Office, at the time in question, had lacked "*any* system for active supervision of trial Assistants by competent supervisors (although the Office did ultimately institute such a system two years or more *after* Walker's trial), Complaint ¶ 39(f) (emphasis added);

(d) that the District Attorney's Office has itself acknowledged the critical need for "*Brady*" supervision of trial ADAs by adopting (*after* Walker's trial) a requirement that those ADAs consult with supervisors "as to the need to disclose exculpatory information", Complaint ¶ 39(g);

(e) that the District Attorney's Office at all relevant times "lacked any practice to review the quality of the job performance of Assistant District Attorneys in any fashion that would disclose [*Brady* violations]", Complaint ¶ 39(h);

(f) that the District Attorney's Office in 1971 was "an extremely high-volume operation which permitted Assistant District Attorneys to devote only a limited amount of time to any particular case", Complaint ¶ 39(i); and

(g) that the latter fact, "[a]s was obvious at the time, . . . made it all the more critical that Assistants receive proper training and supervision in such important matters as the need to recognize and disclose exculpatory information". *Id.*

Walker, in sum, alleged in great detail the substantial deficits in *Brady* training and supervision that led to his wrongful conviction. Nor was it necessary for Walker to plead the obvious facts (a) that the District Attorney knew "to a moral certainty that [his] ADAs [would] *acquire Brady* material" (18) (emphasis added), and (b) that their failure to produce such material to the defense could (as in this case) have very severe consequences. *Compare Canton, supra*, 489 U.S. at 390 & n. 10.

Accordingly, no "heightened" pleading requirement could reasonably be adopted that would find Walker's complaint insufficient. Indeed, the City itself conceded as much below: its 12(b)(6) motion made *no* "particularity" attack whatever against Walker's "District Attorney" allegations.[4]

Since Walker's complaint must be sustained on *any* reasonable pleading standard ("heightened" or otherwise), this is not a good case for the Court to take on the issue presented by the *Leatherman* case. For the same reason, this Court should deny the City's petition forthwith, rather than holding the case pending the *Leatherman* outcome.[5]

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4. While the City (successfully) argued to the district court that Walker's "*Police Department*" allegations failed on particularity grounds, the City's only challenge to Walker's "District Attorney" allegations was a *substantive* argument to the effect that the Kings County District Attorney was not a City policymaker. *See* Court of Appeals R. Nos. 13, 16 (City district court briefs), *passim*. The district court, however, failed to reach the latter argument, instead concluding *sua sponte* that Walker's "District Attorney" allegations, too, had not been pleaded with sufficient specificity (29, 32-33).

5. It is immaterial that Walker's perjury allegations (against both police and prosecutor), viewed *by themselves*, likely would not suffice under the *Leatherman* standard. Walker's core "District Attorney" *Brady* allegations are more than enough to sustain his complaint.

II.

WHETHER THE KINGS COUNTY DISTRICT ATTORNEY ACTED AS A CITY POLICYMAKER IS AN INAPPROPRIATE QUESTION FOR REVIEW BY THIS COURT.

The determination of whether the Kings County District Attorney acted as a municipal policymaker raises no federal question. "[W]hether a particular official has 'final policymaking authority' is a question of state law." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). And this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n. 13 (1986), citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, n. 12 (1984); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

A. The Second Circuit Correctly Interpreted New York Law As ToThe District Attorney's Status.

It is beyond dispute that the Kings County District Attorney is a county functionary. More than ten years ago, in *Kelley v. McGee*, 57 N.Y.2d 522, 533-36 & n. 12, 457 N.Y.S.2d 434, 437-39 & n. 12 (1982), New York's highest court squarely and definitively held that "a District Attorney should no longer be considered a 'state officer,' " but rather must be classified as a *county* officer.

It follows, as New York has decreed by statute, *see* N.Y. County L. §§ 53(1), 941, that Kings County — and hence New York City[6] — is liable for the torts of the Kings County District

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6. A liability of one of New York City's constituent counties is a liability of the City itself. *See Jones v. Queens County*, 1991 WL 37083, at *1 (E.D.N.Y. Mar. 19, 1991) ("city . . . subdivisions such as Queens County are (Cont'd)

Attorney. *See, e.g., Murph v. State of New York*, 98 Misc. 2d 324, 326, 413 N.Y.S.2d 854, 856 (Ct. Cls. 1979) ("Such liability as may exist for acts [of district attorneys] devolves upon the governmental subdivision which employs them, in this case the City of New York"); *Drake v. City of Rochester*, 96 Misc. 2d 86, 94-97, 408 N.Y.S.2d 847, 853-55 (Sup. Ct., Monroe Co. 1978), *aff'd on opin. below*, 74 A.D.2d 996, 429 N.Y.S.2d 394 (4th Dep't 1980) ("the county may be liable for acts of an assistant district attorney . . . if those acts are outside both the absolute immunity of quasi-judicial activity and the qualified immunity of investigatory activity"); *Rosen & Bardunias v. County of Westchester*, 158 A.D.2d 679, 680, 552 N.Y.S.2d 134, 136 (2d Dep't 1990), *app. denied* 76 N.Y.2d 703, 559 N.Y.S.2d 482, *rearg. denied*, 76 N.Y.2d 889, 561 N.Y.S.2d 550 (1990), *cert. denied*, 111 S. Ct. 962 (1991) (citing with approval *Drake, supra*, in holding proper the denial of Westchester County's motion for summary judgment on claims arising out of an assistant district attorney's investigative involvement in the execution of a search warrant); *see also Johnson v. Town of Colonie*, 102 A.D.2d 925, 926, 477 N.Y.S.2d 513, 514 (3d Dep't 1984).[7]

(Cont'd)
not subject to lawsuits in their own names, but only in the name of the City of New York"); *Zimmerman v. City of New York*, 52 Misc. 2d 797, 799, 276 N.Y.S.2d 711, 714 (Sup. Ct., N.Y. Co., 1966) (whether defendant New York *County* had been properly served was of "no consequence," since defendant New York *City* had appeared and county was subdivision of city); *Fisher v. State*, 23 Misc. 2d 935, 936, 203 N.Y.S.2d 363, 364 (Ct. Cls. 1959), *aff'd*, 13 A.D.2d 608, 212 N.Y.S.2d 209 (3d Dep't), *aff'd*, 10 N.Y.2d 60, 217 N.Y.S.2d 52 (1961) (suggesting New York City's liability, under County L. § 53, for district attorney torts); N.Y.C. Admin. Code § 7-110 (providing for City indemnification of district-attorney personnel, and for representation of such personnel by the City Corporation Counsel, pursuant to N.Y. Gen. Munic. L. § 50-k).

7. The Third Department held in *Johnson* that common-law claims predicated upon district attorney misconduct will lie against the involved county "on a theory of *respondeat superior*." The Court nevertheless upheld, on other grounds (immunity and existence of warrant), dismissal of the particular
(Cont'd)

B. The District Attorney Is A City Policymaker.

Petitioner further argues that, because the City purportedly has no control over how the Kings County District Attorney runs his office, the Second Circuit's holding contravenes this Court's decisions in *Monell*, *Pembaur* and *Praprotnik*. Pet. 18. The argument is unfounded and incorrect.

There is, to begin with, no foundation for the City's proposition that it does not "control" the Kings County District Attorney. As Walker has alleged (Complaint ¶ 35), that official is *paid* by the City. Accordingly, the City must be assumed here to have the ability to assure that the District Attorney will properly train and supervise his Assistants.[8]

Second, the Kings County District Attorney is no less a City functionary simply because his writ runs through but one of the City's five constituent counties. The Kings County District Attorney effectively acts as the *City's policymaker for Kings County* in all matters of prosecutorial training and supervision. And, as has been set forth above, it is settled New York law that the State's counties — and hence New York City, as to *its* counties — are responsible for the torts of their district attorneys. *See* Point II.A above.

Further, the City's "no control" argument is refuted by *Pembaur* itself. The Sixth Circuit in *Pembaur* specifically rejected

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(Cont'd)
common-law claims before it. *Id.* The court further upheld dismissal of a 1983 cause of action — but solely because plaintiff Johnson had pleaded nothing but a *respondeat superior* case on that claim as well, failing to allege any culpable *municipal* conduct. *Id.*

8. As to the District Attorney's status as a City "agent," *see generally* the City Corporation Counsel opinions set forth as Appendices B and C hereto.

the district court's holding "that the County could not be held liable for the policies of the Sheriff [an elected official] because the Sheriff was not subject to the control of the Board of Commissioners . . ., the County's governing body." *Pembaur v. City of Cincinnati*, 746 F.2d 337, 340 (6th Cir. 1984), *rev'd*, 475 U.S. 469 (1986). Nor did this Court question the Sixth Circuit's conclusion "that . . . the County Sheriff . . . could establish county policy under appropriate circumstances." *Pembaur*, 475 U.S. at 484. *See also, e.g., Crane v. Texas*, 759 F.2d 412, 429-30 (5th Cir.), *reh. denied en banc*, 766 F.2d 193, 194-95, *cert. denied*, 474 U.S. 1020 (1985) (Texas district attorney had sole responsibility for county's capias system and thus constituted county "policy maker"; even though district attorney had numerous minor attributes of state official, he constituted county official for 1983 purposes since he was elected by county's voters, was paid by county funds and was limited to the county in exercising his state-derived powers); *Parker v. Williams*, 862 F.2d 1471, 1477-81 & n.10 (11th Cir. 1989) (notwithstanding that Alabama sheriff was characterized as a state employee under Alabama law and that, as an elected official, he operated with "considerable autonomy from the county," *id.* at 1481 n. 10, county could have 1983 liability for injury caused by sheriff's policy of inadequate pre-hiring background checks, since sheriff in fact exercised final hiring authority for county's jail); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (Massachusetts county had 1983 liability for consequences of sheriff's strip-search policy where sheriff was responsible under state law for security policy in county correction facilities: "the sheriff was the county official who was elected by the County's voters to act for them and exercise the powers created by state law. Accordingly, the sheriff's strip search policy *was* Plymouth County's policy . . . .") (emphasis original); *Overbay v. Lilliman*, 572 F. Supp. 174, 175-77 (W.D. Mo. 1983) (sustaining 1983 failure-to-train claim against county despite fact that, as elected official, sheriff was "only responsible to the voters": "[I]t is the sheriff who sets the rules and regulations —the policy — for the

sheriff's office. As chief law enforcement officer of the county those policies become the policies of the county." *Id.* at 177).

Finally, there is nothing amiss with the Second Circuit's conclusion here (20-21) that a New York district attorney acts as a county (City) policymaker in administering his office, even though he may wear the State's mantle when engaged in actual "prosecutorial acts." *Compare Gentile v. County of Suffolk*, 926 F.2d 142, 152 n. 5 (2d Cir. 1991), *with Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989). *See also Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989) (prosecutorial acts of district attorney do not give rise to county liability under Section 1983; "an official may simultaneously exercise county authority over some matters and state authority over others," *id.* at 952); *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir. 1985) (Texas county had 1983 liability for County Treasurer's decision to fire employee: "Whatever state duties a County Treasurer may have, . . . in the personnel matters at issue here, Gray was wearing his county hat"); *Crane v. Texas, supra; Parker v. Williams, supra.*

CONCLUSION

The Petition should be denied.

Respectfully submitted,

DOUGLAS S. LIEBHAFSKY
Counsel of Record
PAUL K. ROWE
CLAIRE D. CHAPPELL
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Attorneys for Respondent

Dated: February 2, 1993

APPENDIX A — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK DATED JUNE 6, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. No. 2327 (JSM)

JAMES WALKER,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiff James Walker, on knowledge as to himself and matters in which he was directly involved and otherwise upon information and belief, alleges as follows:

JURISDICTION, VENUE AND JURY DEMAND

1. Plaintiff is a New York State citizen and a resident of the Southern District of New York.

2. Defendant The City of New York (the "City") is a municipal corporation of the State of New York and is a resident of the Southern District of New York.

3. This action arises under 42 U.S.C. § 1983 and under the common law of New York. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343 and by principles of pendent jurisidiction. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

4. On September 18, 1990, plaintiff duly served notice of the present claims pursuant to New York General Municipal Law § 50-e. More than thirty days have elapsed since such service without adjustment or payment of the claims.

5. Plaintiff demands trial by jury of all issues in this action.

FACTS PERTINENT TO ALL CLAIMS

6. At about 10:00 A.M. on June 1, 1970, at least two men robbed an armored truck delivering cash to a check-cashing facility operated by Edward Kargman ("Kargman") at 1834 Fulton Street, Brooklyn, New York (the "Robbery"). Kargman, who had been driving the truck, was shot during the Robbery; he died on or about June 10, 1970. (The Robbery and the felony murder of Kargman (the "Murder") are hereinafter referred to as the "Crimes".)

7. One of the men who committed the Crimes was William Powell ("Criminal Powell"). In October 1971, in New York State Supreme Court, Kings County (the "Trial Court"), Criminal Powell pleaded guilty to the Murder under Kings County Indictment No. 3786/71 (the "Indictment"), which charged him and plaintiff with the Crimes. As Criminal Powell admitted upon his plea, it was he who shot Kargman during the Robbery.

8. Another man involved in the Crimes (the "Shotgun Man")

used a sawed-off shotgun to knock unconscious Jose Ruiz ("Ruiz"), a guard who was accompanying Kargman and assisting with the delivery of cash.

9. The Crimes were investigated and prosecuted by the City's Police Department (the "Police Department") and by the Office of the District Attorney of Kings County (the "District Attorney"). Detective Robert A. Powell, Shield #2466, 77th Precinct ("Detective Powell"), had charge of the investigation for the Police Department. Assistant District Attorney J. Paul Zsuffa ("Zsuffa"), assigned to the District Attorney's Investigation Bureau, had charge of the investigation for the District Attorney's Office.

10. Several months after the Crimes, in or about Fall 1970, one John Snider ("Snider"), who claimed to have been an eyewitness to the Crimes, informed Detective Powell (and other police personnel) that plaintiff was the Shotgun Man. Snider further alleged that one Melvin Givens ("Givens") had also participated in the Crimes. Snider's allegations were made known to Zsuffa in or before April 1971.

11. At the time of the Crimes, both plaintiff and Givens were known to Snider as individuals who frequented the general neighborhood in which the Kargman check-cashing facility was situated. Further, Snider had on occasion seen plaintiff and Givens together in that neighborhood, and he believed them to be good friends (as was the case).

12. At all relevant times, Snider was a long-term drug addict with a significant criminal record. Snider was principally motivated to go to the police with his accusation of plaintiff and Givens by the prospect of sharing in a substantial reward (the "Reward"). Kargan's widow began offering the Reward in the summer of 1970.

Appendix A

13. Detective Powell and Zsuffa, as well as other police and prosecutorial personnel, were aware by no later than April 1971 of the facts alleged in paragraph "12" above.

14. In mid-April 1971, Criminal Powell was arrested and charged with the Crimes. At that point, the authorities still had no evidence implicating plaintiff in the Crimes other than Snider's purported eyewitness identification. Nor did they develop any such evidence thereafter.

15. On April 16, 1971, Zsuffa (with Detective Powell and two other Police Department detectives present) took a formal "Q and A" statement from Snider (the "April 16 Snider Statement"). In the April 16 Snider Statement, Snider repeated his accusation that both plaintiff and Givens had participated in the Crimes.

16. On April 23, 1971, Detective Powell arrested plaintiff for the Crimes. At that time, Detective Powell and other City police officers searched plaintiff's residence for evidence linking plaintiff to the Crimes. They found no such evidence.

17. On the evening of April 23, 1971, a lineup containing plaintiff and several others was conducted at the 77th Precinct stationhouse (the "April 23 Lineup"). Crime victim Ruiz at that time identified a lineup participant *other than plaintiff* as the Shotgun Man (hereinafter, the "Ruiz Identification"). Zsuffa and Detective Powell were immediately aware of the Ruiz Identification, and Zsuffa then and there took a formal "Q and A" statement from Ruiz concerning the same (the "Ruiz Lineup Statement").

18. By no later than April 23, 1971, moreover, Detective Powell, Zsuffa and other police and prosecutorial personnel had

additional grounds to believe that Snider's account of the Crimes might be unreliable: they had learned that Givens might have been incarcerated on the date of the Crimes. Zsuffa indeed prepared an official Investigation Bureau report dated April 23, 1971 (the "April 23 Report") which expressly noted the latter possibility.

19. Givens was in fact in the custody of the City's Department of Correction on the date of the Crimes. Givens accordingly could not have participated in the Crimes.

20. Shortly after April 23, 1971, Detective Powell, Zsuffa and other police and prosecutorial personnel involved in the investigation and prosecution of the Crimes learned the facts set forth in paragraph "19" above.

21. Upon learning those facts, Detective Powell and Zsuffa recognized, correctly, that Sider's wholly-uncorroborated accusation of plaintiff could no longer be credited, and that any pre-existing probable cause to prosecute plaintiff for the Crimes had now been entirely dissipated.

22. Detective Powell and Zsuffa, having no other plausible suspects for the Shotgun Man and strongly desiring to "close the books" on the Crimes, thereupon began to conspire and to act in concert with each other, and with other police and prosecutorial personnel, to do whatever might be necessary, lawful or not, to secure plaintiff's conviction and imprisonment, guilty or not, for the Crimes (hereinafter, the "Conspiracy").

23. Throughout the period of the Conspiracy (which extended at least through mid-May 1990), Detective Powell, Zsuffa and the other Conspirators pursued the Conspiracy's objectives with actual malice toward plaintiff, with utter disregard

for plaintiff's rights under the Constitutions and laws of the United States and of the State of New York, and wholly without probable cause to believe plaintiff guilty of the Crimes.

24. It was a part of the Conspiracy that Zsuffa, Detective Powell and the other Conspirators (a) would do whatever was necessary, including but not limited to the commission and subornation of perjury, to conceal from plaintiff, from plaintiff's counsel, from the Kings County Grand Jury (the "Grand Jury"), and from the Trial Court, both the fact that Snider had falsely accused plaintiff's friend Givens of the Crimes and the fact of the Ruiz Identification (such facts hereinafter, collectively, the "Exculpatory Facts"), and (b) would hold Snider out to the Grand Jury and the Trial Court as truthful in his accusation of plaintiff, notwithstanding that the Conspirators actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that the latter accusation was false.

25. In mid-June 1971, in furtherance of the Conspiracy, Detective Powell, Zsuffa and another Assistant District Attorney ("ADA Doe", a Conspirator), whose name is unknown to plaintiff but who was assigned to the Indictment Bureau of the District Attorney's Office and had charge of presenting plaintiff's case to the Grand Jury, caused Snider to be arrested and jailed as a material witness. The Conspirators then persuaded Snider to join the Conspiracy; as a result, Snider's ensuing Grand Jury testimony deliberately omitted all mention of Givens, while continuing falsely to implicate plaintiff in the Crimes.

26. The Conspirators further saw to it that the Grand Jury did not in any way learn either of the Exculpatory Facts. By reason of the suppression of those Facts, and by reason of other Conspiratorial conduct, the Grand Jury was unable to make a fair

and reliable determination as to the existence of probable cause to charge plaintiff with the Crimes.

27. In or about late June 1971, the Grand Jury returned the Indictment charging plaintiff and Criminal Powell with the Crimes. Plaintiff would not have been so indicted if the Exculpatory Facts had been disclosed to the Grand Jury and if the Grand Jury proceedings had otherwise been conducted so as to achieve a fair and reliable probable-cause determination.

28. The Conspirators continued their active pursuit of the Conspiracy following the return of the Indictment. In so doing, they committed at least the additional overt acts described in subparagraphs (a)- (g) of this paragraph 28.

(a) In order to suppress the Ruiz Identification, Zsuffa testified falsely and perjuriously, at plaintiff's October 1971 *Wade* hearing, to the effect that the April 23 Lineup had never taken place.

(b) To the same end, and at the same hearing, Detective Powell testified falsely and perjuriously to the effect that he had no recollection of the April 23 Lineup and that he knew of no records of that Lineup.

(c) Further to the same end, Assistant District Attorney Benjamin Schmier ("Schmier"), the Assistant who conducted plaintiff's *Wade* hearing and immediately-ensuing trial (and who himself was a Conspirator), deliberately failed to correct the foregoing Zsuffa-Powell testimony, despite his knowledge of its falsity.

(d) Notwithstanding the Trial Court's entry of a September 1971 order requiring disclosure of material favorable to the

defense, the Conspirators deliberately withheld from plaintiff and his trial counsel police and prosecutorial documents reflecting the Exculpatory Facts, including but not limited to: the April 16 Snider Statement; the Ruiz Lineup Statement; the April 23 Report; all Police Department reports recording Snider's accusation of Givens; and the official photographs and stenographic minutes made for the District Attorney's Office, as well as all Police Department records, of the April 23 Lineup.

(e) Detective Powell, Zsuffa, Schmier and other police and prosecutorial Conspirators further saw to it, through continued violation of their own disclosure duties, through "trial preparation" of witnesses Snider and Ruiz, and otherwise, that the defense — as well as the Trial Court and the jury — did not learn of the Exculpatory Facts in any other way at plaintiff's trial.

(f) Schmier deliberately elicited Snider's testimony accusing plaintiff of the Crimes, at both the *Wade* hearing and the ensuing trial, notwithstanding that Schmier actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that that testimony was false and perjurious.

(g) Schmier and Detective Powell further collaborated in bad faith at trial to misleadingly bolster Snider's credibility in the eyes of the jury: without disclosing the details of what Snider had told him in the Fall of 1970 — *and thus without revealing Snider's false accusation of Givens* — Detective Powell pointedly conveyed to the jury, on direct examination by Schmier, that Snider's Fall 1970 story had been entirely consistent with his trial testimony in accusing *plaintiff* of the Crimes.

29. As a result of the foregoing, and as the Conspirators contemplated and intended, the Trial Court and the jury remained

wholly unaware (i) that plaintiff's sole accuser (Snider) had made a like, indisputably *false* accusation against plaintiff's good friend Givens; (ii) that Snider's accusation of plaintiff was also false and perjurious, and was known to be so by the prosecution; and (iii) that the single witness (Ruiz) best positioned to identify the Shotgun Man had actually identified someone *other* than plaintiff as that person.

30. It was a further part of the Conspiracy that neither the Police Department nor the District Attorney's Office would pursue any additional investigation into the identity of the Shotgun Man: once having decided to "nail" plaintiff as the Shotgun Man, Detective Powell, Zsuffa and their co-conspirators avoided any steps which might jeopardize that effort; they accordingly disregarded altogether their public duties to find and prosecute the real Shotgun Man, and the latter has never been identified or apprehended.

31. The Conspiracy achieved its objectives. On October 19, 1971, following and as a direct and proximate result of a *Wade* hearing and trial rendered grossly unfair by the above-described perjury and suppression of evidence, plaintiff was convicted of the Murder (the "Conviction"). On April 5, 1972, the Trial Court sentenced plaintiff on the Conviction to imprisonment for a term of 20 years to life (the "Sentence").

32. Many years after the Conviction, plaintiff obtained evidence of the Exculpatory Facts and of the authorities' complicity in suppressing the same. Plaintiff adduced that new evidence before the Trial Court on a post-conviction motion, and on May 16, 1990, the Trial Court entered an order vacating the Conviction.

33. On June 27, 1990, following a full review of the case against plaintiff, the District Attorney joined with plaintiff in a motion to dismiss the Indictment with prejudice. The Trial Court granted the motion in an order entered that day (the "Dismissal Order", a copy of which is attached as Exhibit 1 hereto). The Dismissal Order effected a "favorable termination" of plaintiff's prosecution under applicable law.

34. Detective Powell, Zsuffa, Schmier, ADA Doe and all other police and prosecutorial personnel who joined in the Conspiracy acted at all relevant times within the scopes of their respective employments with the Police Department and the District Attorney's Office.

35. The District Attorney at all relevant times was (and is) an elected officer of Kings County, one of the constituent counties of the City, and the District Attorney's Office was (and is) funded out of the City's budget. Further, the District Attorney was (and is) designated a "local officer," rather than a "state officer," under the New York Public Officers Law (section 2); and New York has provided by statute (N.Y. County L. §§ 53, 941) that the City's constituent counties (including Kings County), and hence the City itself, shall have liability for torts committed by County officers and employees such as the District Attorney and his Assistants.

36. Notwithstanding that he had no involvement whatever in the Crimes, plaintiff was continuously held in custody therefor from age 31 through age 50. Plaintiff has maliciously and unjustly been deprived of the best years of his life for someone else's crimes; he has been subjected to degrading, dehumanizing and emotionally destructive prison conditions, and has suffered shame, indignity, isolation from society, separation from friends and family, loss of consortium and loss of earnings. Plaintiff has been damaged thereby in an amount not less than $11,000,000.

Appendix A

FIRST CLAIM

37. Plaintiff repeats and realleges the allegations of paragraphs "1" through "36" above.

38. The aforesaid Conspiratorial conduct operated, *inter alia*, to deprive plaintiff of important and well-established rights under the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, including plaintiff's right not to be significantly detained pretrial except pursuant to a fair and reliable determination of probable cause, his right to be free from bad-faith prosecution, his right to confront the trial witnesses against him, his rights to a fair trial and to due process of law, and his right to be free from cruel and unusual punishment. Such misconduct also directly and proximately caused the Conviction, the Sentence and plaintiff's nineteen years of incarceration for the Murder.

39. The foregoing violations of plaintiff's Constitutional rights, and the Conviction, the Sentence and plaintiff's incarceration for the Crimes, were further directly and proximately caused by conduct, chargeable to defendant City, amounting to deliberate indifference to the Constitutional rights of persons coming into contact with the Police Department and the District Attorney's Office, *viz.*, (1) the institution and implementation of grossly and recklessly or deliberately inadequate policies, procedures and regulations of the defendant City, of the Police Department, and of the District Attorney's Office, respecting the safeguarding of the Constitutional rights of accused persons, the truthfulness of testimony to be offered for the prosecution in criminal cases, the handling and disclosure of exculpatory evidence, the proper and competent conduct of criminal investigations and the avoidance of unjust convictions, and/or (2) a gross and reckless or deliberate failure by the defendant City, by

the Police Department, and by the District Attorney's Office, to properly instruct, train and supervise police and prosecutorial personnel as to such matters. In particular, and among other things:

(a) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting (i) the proper handling of exculpatory information and, more generally, the protection of Constitutional rights of accused persons; (ii) the proper handling of pretrial statements of prosecution witnesses; and (iii) the basic duty of the police, as an investigative agency, to pursue not only the conviction of the guilty but the exoneration of the innocent.

(b) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting the proper working relationship between the Police Department and the District Attorney's Office in criminal investigations and prosecutions. The Police Department's deficiencies in this respect included, but were not limited to, a failure to give appropriate guidance to its personnel as to how to respond if confronted by unlawful, unconstitutional or otherwise improper conduct on the part of District Attorney's Office personnel in the course of such investigations or prosecutions.

(c) The Police Department at all relevant times wantonly failed to sufficiently and appropriately train and instruct its personnel (including Detective Powell) as to their duties to be truthful and accurate when giving testimony themselves and to seek only such testimony from non-Police witnesses.

(d) Through the time of plaintiff's trial, the District

Attorney's Office had no training program of any significance for incoming Assistant District Attorneys. By reason of that blatant deficiency, and otherwise, the Office wantonly failed to appropriately train and instruct Zsuffa, Schmier, ADA Doe and other Assistants as to, *inter alia,* (i) their obligations to recognize and disclose exculpatory information and to avoid the use of perjured evidence; (ii) their obligations otherwise to safeguard and protect the Constitutional rights of accused persons; and (iii) their fundamental duty as prosecutors to avoid unjust convictions (even at the expense of "losing" cases).

(e) The District Attorney's Office at the time of plaintiff's trial had no written policies, procedures or practice guides concerning (i) the prosecutor's duty to disclose exculpatory material, (ii) the prosecutor's duty to disclose pretrial statements of prosecution witnesses, or (iii) the prosecutor's duty to avoid the introduction of perjured evidence.

(f) The District Attorney's Office failed, until at least two years after plaintiff's trial, to institute any system for active supervision of trial Assistants by competent supervisors.

(g) The resultant absence of supervision was particularly critical as to the handling of exculpatory information uncovered by police and prosecutorial personnel, as the District Attorney's Office itself has now belatedly acknowledged: it is now, but was not in 1971, required procedure for trial Assistants in that Office to consult with supervisors as to the need to disclose exculpatory information to the defense.

(h) The District Attorney's Office at all relevant times lacked any practice to review the quality of the job performance of Assistant District Attorneys in any fashion that would disclose

whether the Assistants were properly discharging their obligations to disclose exculpatory material and not to adduce perjured testimony.

(i) The District Attorney's Office in 1971 was an extremely high-volume operation which permitted Assistant District Attorneys to devote only a limited amount of time to any particular case. As was obvious at the time, this circumstance made it all the more critical that Assistants receive proper training and supervision in such important matters as the need to recognize and disclose exculpatory information.

(j) The Police Department's deficiencies set forth in subparagraphs (a)-(c) of this paragraph 39 and the District Attorney's Office's deficiencies set forth in subparagraphs (e)-(i) of this paragraph 39 were collectively, and each such deficiency was individually, a substantial factor in bringing about the aforesaid violations of plaintiff's Constitutional rights.

40. At all relevant times, there was no personal animosity of any sort between plaintiff and any of the police or prosecutorial Conspirators. Indeed, plaintiff had had no contact whatever with any of such Conspirators prior to his arrest for the Crimes. Under the circumstances, conduct like the Conspirational conduct complained of herein would not ordinarily have occurred in the absence of gross and wanton deficiencies in police and prosecutorial training and supervision.

41. The City's Police Commissioner, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to the Police Department's

performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the City's Police Commissioner (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifferenee to the Constitutional rights of persons coming into contact with the Police Department.

42. The District Attorney, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to his Office's performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the District Attorney (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifference to the Constitutional rights of persons coming into contact with his Office.

43. The foregoing violations of plaintiff's Constitutional rights constituted Constitutional torts and were effected by actions undertaken under color of law, statutes and regulations of the State of New York.

44. By reason of the foregoing, defendant is liable to plaintiff, pursuant to 42 U.S.C. § 1983, an amount not less that $11,000,000.

SECOND CLAIM

45. Plaintiff repeats and realleges the allegations of paragraph "1" through "36" above.

46. At all relevant times, Detective Powell, Zsuffa, Schmier,

Appendix A

ADA Doe and the other Conspirators prosecuted plaintiff with actual malice and without probable cause to believe plaintiff guilty of the Crimes.

47. The City is responsible for the Conspirators' misconduct under principles of *respondeat superior.*

48. By virtue of the foregoing, defendant is liable to plaintiff, pursuant to the New York law of malicious prosecution, in an amount not less than $11,000,000.

WHEREFORE, plaintiff demands TRIAL BY JURY of all issues in this action, and further demands JUDGMENT against defendant as follows:

I. For compensatory damages in an amount not less than $11,000,000.

II. For reasonable attorneys' fees, together with costs and disbursements, pursuant to 42 U.S.C. § 1988 and to the inherent powers of this Court.

III. For pre-judgment interest as allowed by law.

IV. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 6, 1991

Appendix A

Respectfully submitted,

s/ DS Liebhafsky
Douglas S. Liebhafsky
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200
(DL 6457)

Attorneys for Plaintiff

APPENDIX B – CITY CORPORATION COUNSEL'S OPINION NO. 4-83 DATED MAY 13, 1983

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

FREDERICK A. O. SCHWARZ, JR
Corporation Counsel

(212) 566-

Opinion No. 4-83
May 13, 1983

Hon. Elizabeth Holtzman
District Attorney, Kings County

Hon. Mario Merola
District Attorney, Bronx County

Hon. Robert M. Morgenthau
District Attorney, New York County

Hon. William L. Murphy
District Attorney, Richmond County

Hon. John J. Santucci
District Attorney, Queens County

Dear District Attorneys:

This opinion is written in response to the request by some of the district attorneys to confirm the advice of this office that the

district attorneys in the five counties which comprise the City of New York are entitled to be represented in civil actions and proceedings by the Corporation Counsel and indemnified by the City of New York pursuant to the terms and conditions set forth in § 50-k of the General Municipal Law.

District attorneys, members of their staffs and authorized volunteers are employees of the City for the purpose of § 50-k, which provides for the representation and indemnification of employees of City agencies in civil actions and proceedings. Paragraph e of subdivision one of § 50-k defines "employee" for the purposes of that section to mean:

> "any person holding a position by election, appointment or employment in the service of any agency, whether or not compensated, or a volunteer expressly authorized to participate in a city sponsored volunteer program, but shall not include an independent contractor."

Paragraph a of that subdivision defines "agency" for the purposes of § 50-k to include:

> "a city, *county*, borough or other *office* . . . the expense of which are paid for in whole or in part from the city treasury. . . ." (Emphasis added).

Thus to be covered by the provisions of § 50-k, a person must be an employee of an "agency", as the term is defined in that section. The office of district attorney meets that definition: (1) The expenses of the office of a district attorney "are paid for in whole or in part from the city treasury", and (2) as the provisions of

the State Constitution and the statutes and cases cited and discussed below demonstrate conclusively, the office of district attorney is a county office.

Turning first to the State Constitution, Act. XIII, § 13, subd. a, provides in relevant part:

> "Except in counties in the city of New York and except as authorized in section one of article nine of this constitution, . . . district attorneys . . . shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require . . . . In each county in the city of New York a district attorney shall be chosen by the electors once in every two or four years as the legislature shall direct."

Subdivision c of § 13 refers to a district attorney in the City of New York in terms that clearly indicate that the office is a county office:

> "The city of New York is hereby vested with power from time to time to abolish by local law, as defined by the legislature, *the office of any county officer within the city other than . . . district attorneys*, and to assign any or all functions of such officers to city officers. . . . " (Emphasis added.)

That the district attorneys are county officers was recognized by the Court of Appeals in *Kelly v. McGee*, 57 NY2d 522, 536 n. 12 (1982), wherein the Court stated:

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> "It is certainly worthy of note that the only specific reference in the Constitution to the nature of District Attorney as State or local is phrased in terms implicitly recognizing its character as local, or county, in nature."

In *Kelly*, the Court considered whether district attorneys are subject to the provisions of Article XIII, § 7 of the State Constitution, which prohibits mid-term increases or decreases in the compensation of "state officers named in this constitution". The Court concluded that when this proscription was adopted:

> "the District Attorney was considered a State officer within the meaning of section 7 of article XIII, notwithstanding the fact that, for other purposes, the office was deemed local in nature (e.g., *Fisher v State of New York*, 10 NY2d 60 [District Attorney is not a State officer within the meaning of section 2 of the Public Officers Law so as to render the State liable for his tortious conduct]; *Ritter v State of New York*, 283 App. Div. 833 [same]; see *Burke v Kern*, 287 NY 203, 212 [Sheriff is a county officer, although also a State officer for some purposes]; *Matter of Miller v State of New York*, 279 NY 74, 77 [county register and employees of that office are not in State service for purpose of Workers' Compensation Law]). *We conclude, however, that more recent constitutional developments have operated to remove this office from its previous constitutional stature and that a District Attorney may no longer properly be considered*

> *a State officer.*" 57 NY2d at 534. (Emphasis added).

Further, a district attorney, who is elected in New York City and elsewhere in the State on a county-wide basis (N.Y. Const., Art. XIII, § 13, subd. a; County Law, § 926), and whose duty it is to prosecute all "crimes and offenses cognizable by the courts of the county for which he shall have been elected" (County Law, §§ 700, 927), is a local officer under the terms of § 2 of the Public Officers Law. That section distinguishes between a state officer" and a "local officer" in the following manner:

> "The term 'state officer' includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States. *The term 'local officer' includes every other officer who is elected by the electors of a portion only of the state, subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state.* The office of a state officer is a state office. The office of a local officer is a local office." (Emphasis added).

Appendix B

Accordingly, on the basis of the relevant constitutional, statutory and case law, it is the opinion of this office that the office of district attorney in each of the counties comprising the City of New York is an agency of the City for the purposes of § 50-k of the General Muncipal Law, and, therefore, district attorneys, members of their staffs and authorized volunteers are entitled to be represented by the Corporation Counsel and indemnified by the City in accordance with the terms and conditions set forth in § 50-k.

Sincerely,

Frederick A. O. Schwarz, Jr.
Corporation Counsel

APPENDIX C — CITY CORPORATION COUNSEL'S OPINION NO. 31-84 DATED SEPTEMBER 10, 1984

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel

(212) 566-4515

Opinion No. 31-84
September 10, 1984

Hon. Powell Pierpoint
Chair
Board of Ethics

Dear Mr. Pierpoint:

This letter is in response to an opinion request, dated April 2, 1984, from Judith Grad, Counsel, asking whether district attorneys within the City of New York and members of their staffs are subject to the ethics provisions set forth in Chapter 68 of the New York City Charter (§ 2600 *et seq.*).

As you are aware, Chapter 68 of the Charter establishes the Board of Ethics and sets forth its powers. Section 2602(a) of that chapter directs the Board to render advisory opinions with respect to questions of ethical conduct, conflicts of interests and other matters under the provisions of Chapter 68. That chapter applies to any officer or employee of the city or of any city agency.* The term

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* The applicability of § 2606 differs slightly from that of other sections in that it pertains to an "officer or employee of the city".

"agency" is defined in § 2604(e) as:

> "a city, *county*, borough or other *office*, position, administration, department, division, bureau, board, commission, authority, corporation or other agency of government, the expenses of which are paid in whole or in part from, the city treasury, and shall include the board of education, the board of higher education, school boards, city and community colleges, community boards, the New York city transit authority, the New York city housing authority, and the triborough bridge and tunnel authority, but shall not include any court of any corporation or institution maintaining or operating a public library, museum, botanical garden, arboretum, tomb, memorial building, aquarium, zoological garden or similar facility." (Emphasis added).

A district attorney is elected in New York City, as well as elsewhere in the state on a county-wide basis, and the expenses of the office of district attorney "are paid in whole or in part from the city treasury."* Therefore, in accordance with the definition of "agency" contained in § 2604 (e) and for the additional reasons discussed herein, it is our opinion that the office of district attorney is clearly a "county office" and an "agency" as defined in § 2604(e), and is thus subject to the provisions of Chapter 68.

In Opinion No. 4-83, dated May 13, 1983, this office

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* According to the Office of Management and Budget, the City funds 80 per cent of the budgets of district attorneys on a city-wide average basis.

concluded that the office of district attorney in each of the counties comprising the City of New York is an agency of the City for the purposes of § 50-k of the General Municipal Law. Pursuant to this section, district attorneys, members of their staffs and authorized volunteers are entitled to be represented and indemnified by the City under the conditions set forth therein. The definition of "agency" as used in the ethics provisions of the Charter is substantially identical to that in § 50-K.

The Court of Appeals has held that district attorneys are local officers. In *Kelly v. McGee*, 57 NY 2d 522 (1982), the Court considered whether district attorneys are subject to the provisions of Article XIII, § 7 of the State Constitution which prohibits mid-term changes in the compensation of "state officers named in this constitution". The Court concluded that although district attorneys were considered State officers at the time when Article XIII, § 7 of the State Constitution was adopted, subsequent amendments to the Constitution had given county governments greater authority "to adopt certain variations concerning the offices of District Attorney***" (57 NY 2d at 535). It observed at 57 NY 2d 534-536:

> "*** more recent constitutional developments have operated to remove this office from its previous constitutional stature and that a District Attorney may no longer properly be considered a State officer.
>
> * * *
>
> Indeed, we believe that under the present constitutional framework, the characterization of a District Attorney as a State officer is conceptually incompatible with the broad

> authority afforded counties over their local offices by the home rule provisions [contained in the State Constitution]."

In a footnote to the above quote (57 NY2d 536 n. 12), the Court noted additionally:

> "This conclusion is further buttressed by the language of article XIII (§ 13, subd. [c]) of the Constitution, which states that the City of New York may abolish the 'office of any county officer within the city other than judges, clerks of counties and district attorneys'. It is certainly worthy of note that the only specific reference in the Constitution to the nature of the office of District Attorney as State or local is phrased in terms implicitly recognizing its character as local, or county, in nature."

More recently, in *Carey v. Oswego County,* 91 AD 2d 62, 64 (1983), aff'd on op. below 59 NY2d 848 (1983), the Appellate Division Third Department stated:

> "The question of whether the office of District Attorney is a local office or State office was recently settled by the Court of Appeals in Matter of *Kelly v. McGee*, (57 NY2d 522, 534-535), where the court concluded that as a result of the 'significant change in the relationship between county and State governments brought about by the home rule provisions of our State Constitution', District Attorneys must be considered local officers."

Thus, it is clear that district attorneys, including those within the City of New York, are local officers.

Public officers and employees within the state on both the state and local levels are subject to statutory provisions regarding ethical conduct. Public Officers Law, § 73 sets forth restrictions on the business and professional activities of state officers and employees and party officers, and § 74 of that law establishes the State's Code of Ethics. Those sections apply to officers and employees of state agencies.* In view of the fact that district attorneys and the members of their staffs are not state officials, these provisions of the Public Officers Law are not applicable to them.

Article 18 of the General Municipal Law (§ 800 *et seq.*) sets forth the standards of ethical conduct for all officers and employees of counties, cities, towns, villages, school districts and other similar local entities outside of the City of New York. Even prior to the Court of Appeals decision in *Kelly*, the Attorney General and State Comptroller had determined that district attorneys outside of the City were local officers subject to the provisions of Article 18. (See 1972 Op. Atty. Gen. 205; 1966 Op. Atty. Gen. 80; Op. State Compt. No. 70-1059.) The City of New York as well as the counties and public agencies therein is specifically excluded from Article 18 presumably because the City

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* The term "agency" is defined in those sections as:

> "any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor."

has its own comprehensive ethics provisions regarding its officers and employees. By logical inference as well as by reference to the express provisions of Charter, § 2604(e) defining the term "agency", district attorneys within the City are subject to the City's ethics provisions contained in Charter 68 of the Chapter.*

Accordingly, it is the opinion of this office that district attorneys within the City of New York and their staffs are subject to the ethics provisions of the City Charter.

Sincerely,

Frederick A. O. Schwarz, Jr.
Corporation Counsel

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* County Law, § 700(8) directs that "the district attorney of a county having a population of more than one hundred thousand . . . shall give his whole time to his duties" and "shall not engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his duties as district attorney." The legislative history of this section indicates that it was enacted for the purpose of requiring district attorneys in counties with a population over 100,000 to devote their full time to their duties as district attorneys. (See Governor's Memorandum, 1969 *Legislative Annual* at 28.) This provision is in no way inconsistent with the provisions of Chapter 68 which, for the reasons expressed herein, also are applicable to the district attorneys within New York City.

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-956

IN THE SUPREME COURT
OF THE UNITED STATES

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

O. PETER SHERWOOD,
Corporation Counsel for the
City of New York,
Attorney for Petitioner,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1029, 1056 or 1010

LEONARD J. KOERNER*,
STEPHEN J. McGRATH,
A. ORLI SPANIER,
of Counsel.

February 16, 1993.

*Counsel of Record

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IN THE
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- against -

JAMES WALKER,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

I. THE ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT SUFFICIENT TO WITHSTAND DISMISSAL UNDER THE FIFTH CIRCUIT'S "HEIGHTENED" PLEADING STANDARD CURRENTLY UNDER REVIEW BY THIS COURT.

(1)

As set forth on page seven (7) in footnote five (5) of respondent's brief in opposition to the petition for a writ of certiorari ("Resp. Br."), respondent concedes that his perjury claims, against both the police and the prosecutor, would probably not survive a motion to dismiss under the "heightened" pleading standard for Monell §1983 claims currently under review by this Court in the case of Leatherman v. Tarrant Co. Narcotics Intelligence Unit, 954 F.2d 1054 (5th Cir., 1992), cert. granted, 112 S.Ct. 2989 (June 22, 1992). While petitioner believes that this case merits full review, in light of respondent's concession, at the very least the petition should be held in abeyance pending determination of Leatherman and, should the "heightened" pleading standard of Leatherman be adopted, so much of the judgment of the Court of Appeals as failed to dismiss the perjury claims should be vacated.

(2)

Respondent is incorrect when he argues that the allegations in the amended complaint against the Kings County District Attorney's Office ("DA's Office) are sufficient to withstand a motion to dismiss a Monell §1983 claim for failure to train or supervise. As established by this Court in City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), municipal liability for failure to train or supervise will lie only where the failure amounts to "deliberate

indifference" to people's constitutional rights. Id. at 388, 389, 392. "Deliberate indifference" is established by demonstrating "a 'deliberate choice to follow a course of action made from among various alternatives' by city policymakers". Id., at 389 (citation omitted). This can be done by alleging either: (i) facts which show that the need was so obvious because the lack of training or supervision would be so likely to result in a violation of constitutional rights; or (ii) a pattern of prior incidents of misconduct that would put the municipality on notice that there was such a need. Id. at 396-397, (O'Connor, J., concurring).

Respondent's amended complaint is devoid of any allegations demonstrating a pattern that the DA's Office failed to turn over Brady material to defense counsel other than in this one instance (see amended complaint, pp. 1a-17a, annexed as Appendix A ["Appendix A"] to Resp. Br.).

Moreover, nowhere in respondent's amended complaint did he allege that, at the time of his arrest or trial, the Brady decision was so new and so important that it should have been obvious to the DA's Office that it was necessary to train its staff on the requirements of Brady, beyond what they had learned in law school and needed to know in order to pass the bar examination (see Appendix A at 1a-17a). Indeed, the Brady decision was not so new; it had come down in 1963, whereas respondent's arrest and trial had occurred some eight years later in 1971 (see Appendix A at 4a, 9a). Nor did respondent allege any

other facts which would show that the need for such training was "obvious" at that time. The fact that subsequent to this case supervision concerning Brady issues was instituted by the DA's Office (see Resp. Br. at 6), does not mean that, prior to the incident alleged herein, there had been any pattern of incidents that should have put the DA's Office on notice or that the need for such training was obvious.

Accordingly, respondent's claim against the DA's Office would not withstand a motion to dismiss, particularly under the fifth circuit's heightened pleading standard, because this Court has made clear that mere lack of training in a particular area, in and of itself, is insufficient to make out a claim for municipal liability. City of Canton, Ohio v. Harris, supra, 489 U.S. at 389-392.

II. RESPONDENT'S ARGUMENT, THAT THE CITY'S LACK OF CONTROL OVER TRAINING AND SUPERVISION DECISIONS CONCERNING THE HANDLING OF BRADY MATERIAL DOES NOT PRECLUDE §1983 LIABILITY, FLIES IN THE FACE OF THIS COURT'S MANDATE IN MONELL AND ITS PROGENY.

At pp. 10-12 of Resp. Br. he cites, inter alia, the sixth circuit's decision in Pembaur v. City of Cincinnati, 746 F.2d 337, 341 (6th Cir., 1984), for the proposition

that the City need not have control over the training and supervision decisions of the DA's Office in order to be found liable for such policies and practices in a §1983 Monell claim. Respondent, however, misconstrued the language of the sixth circuit. The Court therein noted that the lack of control over the sheriff's office by the county's governing body "[did] not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such that his acts may fairly be said to represent the County's official policy with respect to the specific subject matter" Id. at 341 (emphasis added). In short, the sixth circuit's decision did not depart from the fundamental principle, established by Monell and its progeny, that §1983 municipal liability will lie only where responsibility for the policy or practice can be attributed to the municipality. See Pembaur v. City of Cincinnati, 475 U.S. 469, 479.

Respondent's argument misses this critical point. He seeks, instead, to impose liability on the City based upon a theory of respondeat superior, i.e., because the City pays the salary of the district attorney and indemnifies him in tort actions, the City can be held responsible for his actions or failure to act on policy and practice matters (see Resp. Br. at 8-10). It is well-settled, however, that §1983 liability will not lie against a municipality merely on a theory of respondeat superior. Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978).

Moreover, payment of the district attorney's salary and indemnification for tortious conduct are not dispositive on the issue of control, particularly where, as here, those responsibilities are mandated by state statute (see N.Y. Co. Law §§53(1), 928, 930, 940. See also N.Y.C. Admin. Code §7-110), and in no way confer any authority upon the City to control how the district attorney runs his office with respect to executing its prosecutorial functions.

Indeed, respondent failed to rebut a single case cited by petitioner for the proposition that, under New York State law, a municipality cannot be held liable for the prosecutorial acts of the district attorney because the City has no control over the manner in which he performs those duties (see Pet. Br. at 20-21 and Resp. Br. at 8-12). Decisions concerning whether information constitutes Brady material and therefore must be turned over to the defense, are clearly an important aspect of a prosecutor's function qua prosecutor.

On the other hand, the essence of §1983 Monell liability is the concept of responsibility, i.e., that a municipality can be held liable either because it has some significant input into choosing a particular policy or practice from among the various alternatives; or it allows certain practices to exist, despite the fact that doing so results in deprivations of constitutional rights. See Pembaur v. City of Cincinnati, supra, 475 U.S. at 478-480.

Here, however, it is the district attorney who has sole responsibility for making the choices of how to train and supervise his staff in carrying out their prosecutorial functions, including, inter alia, recognizing what constitutes Brady material and how to handle such material. The City has absolutely no input into, no influence, and no control over what topics are chosen, or how those topics are taught.

Accordingly, it would be fundamentally unfair, and violative of this Court's decisions in Monell and its progeny, for the City to be subject to liability as the wrongdoers, when the training policies and practices in question are completely out of the City's hands.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
Attorney for Petitioner.

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
A. ORLI SPANIER,
of Counsel.

*Counsel of Record.